* Together with No. 1089, Levinson et al. v. United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 995

ROSS HOWARD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

ROSS HOWARD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Ross Howard, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A1), entered in the above entitled action on December 30, 1968, in which case the petitioner was one of the appellants.

A certified transcript of the record in the above case, including the proceedings in the said Court of Appeals, has been furnished to this Court by the Clerk of the Sixth Circuit Court of Appeals.

OPINION BELOW

The opinion of the Court of Appeals, upon information and belief, has not been reported at this time but appears as Appendix A to this petition (p. A1). The following proceedings are included as part of the appendix:

Appendix B, Judgment and Commitment of the District Court A34

Appendix C, Motion for New Trial Filed in District Court A35

Appendix D, Order Denying Motion for New Trial, etc. (re Defendant, Ross Howard) A37

Appendix E, Order Denying Motion for New Trial (re Defendant, Levinson) A40

JURISDICTION

The date of the judgment of the Sixth Circuit Court of Appeals (Appendix A1) and the date it was entered was December 30, 1968.

The jurisdiction of this Court to review the above-mentioned decree of the said Court of Appeals is invoked under the provisions of 28 U.S.C.A., Section 1254 (1).

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

QUESTION PRESENTED

Did the "Defraud the United States" portion of the indictment charge an offense against the United States and if it did, was the indictment and its prosecution both on its face and in its application to this defendant-appellant, violative of the defendant-appellant's rights under the Sixth Amendment and the due process clauses of the Fifth Amendment and Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amendments to the Constitution provide in pertinent part:

V

"No person. . . . . , nor be deprived of life, liberty or property, without due process of law; . . . ."

VI

"In all criminal prosecutions, the accused shall. . . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . ."

XIV

Section 1:

". . . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

18 U.S.C.A. §371:

Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

38 U.S.C.A. §1802:

". . . . . (d) Loans will be automatically guaranteed under this chapter only if made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State, or (2) by any State. Any loan proposed to be made to a veteran pursuant to this chapter by any lender not of a class specified in the preceding sentence may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this chapter."

38 U.S.C.A. §1810:

". . . . . (b) No loan may be guaranteed under this section or made under Section 1811 of this title unless—

(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;

(2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper

relation to the veteran's present and anticipated income and expenses;

(3) the veteran is a satisfactory credit risk;

(4) the nature and condition of the property is such as to be suitable for dwelling purposes;

(5) the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by the Administrator; and

(6) if the loan is for repair, alteration, or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property. . . . . ."

STATEMENT OF THE CASE

The petitioner, Ross Howard, and others were indicted in the United States District Court for the Eastern District of Michigan on a charge of violating the general conspiracy statute, 18 U.S.C.A. §371 which provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

Count one of the indictment charged that the defendants

". . . did in violation of Title 18, U.S.C., Section 371, unlawfully, wilfully, knowingly and feloniously conspire between and among themselves, and with others to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to defraud the United States of America, in particular the Veterans

> Administration, an agency of the United States of America, of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38, United States Code, and the rules and regulations promulgated thereunder, and to violate Section 1001, Title 18, United States Code."

Paragraph 3 of count one of the indictment which the appellate court held (pp. A8-A9 Appendix A) particularized the quoted portion of the charging language of the "Defraud the United States" states:

> "It was a part of said conspiracy that defendants would represent that Wayne . . . processed loans to veterans (authorized pursuant to Sec. 1802 (d), Title 38, United States Code) and submitted these loans to the Veterans Administration, for automatic guaranty, when in fact the aforesaid loans were, as intended by the defendants, processed by the Franklin Mortgage Corporation (not authorized pursuant to Section 1802 (d), Title 38, United States Code to take such action) as the intended mortgagee."

Paragraph 4 of count one which the appellate court held particularized the false state offense portion of the charging section of the indictment (pp. A8-A9 of Appendix A) reads as follows:

> "It was a further part of said conspiracy that the defendants would submit, and cause to be submitted, the following loan documents and reports, among others, to the Veterans Administration in connection with the foregoing loans:
>
> (a) Veterans Administration Report of Home Loan Processed on Automatic Basis—VA Form 26-1820.
>
> (b) Mortgage Closing Statements.

(c) Request for Modification of Procedure in Respect to Postponement of Off-Site or Exterior On-Site Improvements. VA Form VB-4-1847.

(d) Escrow Agreements for Postponed Exterior On-Site Improvements. VA Form 26-1849.

(e) Letters of Submission to the Veterans Administration.

(f) Wayne National Life Insurance Company Loan Applications which loan documents and reports contained false and fraudulent statements as to the assets of the veterans borrower, his debts, credit rating, escrow payments, down payment on the purchase price and employment record, and which loan documents and reports wilfully concealed the material fact that the FRANKLIN MORTGAGE CORPORATION was the actual lender from whom the guaranty was being obtained."

Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Section 1802 (d) provides for the issuance of automatic guaranties on loans made by "supervised lenders." A "supervised lender" is generally any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Wayne National Life Insurance Company qualified as a "supervised lender" because it was an insurance company subject to the supervision of the Michigan Insurance Commissioner.

Title 38, U.S.C.A., Section 1802 (d), which authorizes the "automatic basis" is set forth below:

"(d) Loans will be automatically guaranteed under this chapter only if made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject

to examination and supervision by an agency of the United States or of any State, or (2) by any State. Any loan proposed to be made to a veteran pursuant to this chapter by any lender not of a class specified in the preceding sentence may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this chapter."

The appellate court at pp. A9-A10 of this opinion (Appendix A) held in reference to the conspiracy to defraud portion of the indictment:

"The statement in the indictment that the defendants conspired to defraud the United States 'of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38, United States Code, and the rules and regulations promulgated thereunder' is a clear and definite statement of the governmental function which the defendants allegedly conspired to obstruct and impair. We hold that the indictment is not vague or ambiguous and thus satisfies the requirements of the Sixth Amendment.

"The following statement by the Supreme Court in *United States* v. *Debrow*, supra, at 377-378, is relevant to the alleged insufficiency and invalidity of the present indictment:

'The charges of the indictment followed substantially the wording of the statute which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the

name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7 (f), F.R. Crim. Proc.'

"We hold that the indictment is sufficient and does not violate the Fifth or Sixth Amendments to the Constitution."

The Circuit Court of Appeals affirmed the Judgment of the District Court which had upon conviction of the petitioner sentenced him to incarceration for a term of 18 months and a fine in the amount of $10,000.00.

A detailed statement of the facts is presented in the opinion of the appellate court, Appendix A.

REASONS FOR GRANTING THE WRIT

(The petitioner has incorporated in his Argument parts out of context of Professor Goldstein's, "Conspiracy to Defraud the United States" *68 Yale L. J. 405*, and of his co-defendant's Strong's Appellate Brief.)

I.

The "Defraud" Clause Allegations of Count I Are Constitutionally Insufficient to State an Offense Against the United States.

Count I is read as having invoked the "defraud" clause, thus ignoring the plain language of the indictment, it still fails to state an offense against the United States because it is vague and ambiguous and forced the petitioner to defend with the chief issue undefined, and permitted a crucial change in the Government's theory at the close of the case to the prejudice of Howard.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment "be a plain, concise and definite written statement of the essential facts constituting

the offense charged." Although indictments will not be invalidated because of "technical deficiencies which did not prejudice the accused," *Smith* v. *United States,* 360 U.S. 1, 9 (1959), courts will not hesitate to find insufficient those indictments which deprive the defendant of "the substantial safeguards to a criminal defendant which an indictment is designed to provide." *Russell* v. *United States,* 369 U.S. 749, 763 (1962).

The nature of the "substantial safeguards" which the criminal indictment must afford to the defendant were succinctly stated by the Court in *Russell.* They are founded directly on constitutional grounds:

> Resolution of the issue presented in the cases before us thus ultimately depends upon the nature of "the substantial safeguards" to a criminal defendant which an indictment is designed to provide. . . .
>
> In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction" 269 U.S. at 763-64.

Concretely applied, the "substantial safeguards" require that the indictment not charge the elements of the offense in generic terms, but that it state the specifics. As the Supreme Court stated in *United States* v. *Cruikshank,* 92 U.S. 542, 558 (1876):

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descent to particulars."

In *Russell,* the Court invalidated an indictment which omitted a statement of the subject under inquiry by a Congressional committee, notwithstanding that the indictment was framed in the language of the criminal statute itself and had set forth in detail the time and place of the hearing and the precise questions which the defendants had refused to answer. The indictment in the instant case similarly fails to meet the constitutional criteria discussed in *Russell* and embodied in the requirements of Rule 7(e).

The inherent dangers of a conspiracy brought under the "defraud" clause is stated in *Dennis* v. *United States,* 384 U.S. 855, 860-861 (1966), where the Court reaffirmed the doctrine of the "Krulewitch Warning", 54 Georgetown Law Review 133.

> "[1] We first discuss the question, considered both in the District Court and in the Court of Appeals, whether the indictment properly charged a conspiracy to defraud the United States under 18 U.S.C. §371. We agree that indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable. See Krulewitch v. United States, 336 U.S. 440, 445-458, 93 L. Ed. 790, 795-801, 69 S. Ct. 716 (concurring opinion); United States v. Bufaline, 285 F.2d 408, 417-418 (C.A.2d Cir. 1960). But in the present case, we con-

clude that the indictment for conspiracy was proper as to each of the petitioners.

[2] Four of the petitioners—those who filed the affidavits alleged to be false—presumably could have been indicted for the substantive offense of making false statements as to a 'matter within the jurisdiction of' the Board, a violation of 18 U.S.C. §1001 (1964 Ed.). But the essence of their alleged conduct was not merely the individual filing of false affidavits. It was also the alleged concert of action—the common decision and common activity for a common purpose. The conspiracy was not peripheral or incidental. It lay at the core of the alleged offense. It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge. This conspiratorial program included, as prime factors, not only those who themselves filed the false statements, but others who were equally interested in the conspiratorial purpose and who were directly and culpably involved in the alleged scheme. The Government sought to fasten culpability upon all of the conspirators. The indictment properly charges a conspiracy, and with the required specificity alleges the culpable role of each of the petitioners." (Footnotes omitted)

The charging language of Count I of the "Defraud" part of the indictment charges a conspiracy to defraud the VA of:

> "its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder."

Paragraph 3 of Count I, the appellate court held particularized the provisions of Section 1801, et seq., Title 38 U.S.C.A. and the rules and regulations and it said:

> "It was a part of said conspiracy that defendants would represent that Wayne . . . processed loans to

veterans (authorized pursuant to Sec. 1802(d), Title 38 United States Code) and submitted these loans to the Veterans Administration, for automatic guaranty, when in fact the aforesaid loans were, as intended by the defendants, processed by the Franklin Mortgage Corporation (not authorized pursuant to Section 1802 (d) Title 38, United States Code to take such action) as the intended mortgagee."

If this is the language to be considered to state the generic definition of the offense, and it must be for it is the only paragraph or language in Count I which remotely relates to the "Defraud" portion of Count I, then the prohibited is the processing of loans by "Franklin" (a non-supervised lender) on behalf of "Wayne" (a supervised lender).

The indictment called upon Howard to defend against the broad-brush reference to "the provisions of Section 1801, et seq., Title 38 United States Code, and the *rules and regulations thereunder.*" [Emphasis added.] How could he know which of the numerous statutory sections in Chapter 37 (dealing with Home Loans)—presumably the group meant by "Section 1801, et seq."—were the ones on which the charge against him was based? Similarly, how could he know which of the numerous rules and regulations he was charged with conspiring to violate?

In *Russell,* supra, at 766, it was said that:

"The vice which inheres in the failure of an indictment under 2 U.S.C. §192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . .' *United States* v. *Simmons,* supra [96 U.S.] at 362. A cryptic form of indictment in cases of this kind requires the defend-

> ant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture."

The evil proscribed in *Russell* was present to the extreme in this case. The Government forced Howard "to go to trial with the chief issue undefined." The Government's initial theory, if it is one, is set forth in paragraph 3 of Count I and condemns the "processing" of loans contrary to Section 1802(d) of the statute because such "processing" was done by a non-supervised lender (Franklin) rather than by a supervised lender (Wayne).

The Government's own proof disclosed at least four or five other supervised lenders who had contracts with Franklin under which the latter "processed" loans and agreed to repurchase them from such supervised lenders after the issuance of the VA guaranty. Such programs were expressly approved by the VA (Frase 1305r-1310r), whose regulation (Exhibit 146 at 2010r) also permitted it. The evidence also disclosed, and the Government conceded in its closing argument, that the written contract entered into between Franklin and Wayne (Exhibit 45 at 1947r), which certainly called for Franklin to "process" the loans, was in no manner illegal. Thus, Mr. Morris stated in his closing argument for the Government that (1744r):

> "The government has never, and does not at this time, contend that the contract as drawn, including the contract in this particular case, the contract in the Public Bank case was in any manner illegal. But the purpose here is that the contract as it was drawn and the agreement which they agreed, just was not the manner in which they were transacting the busi-

ness, and how it was drawn was set forth in this letter by Ross Howard on February 26, 1963."

The Government's real theory of the case was not asserted until, after some ten weeks of testimony, the requests for instructions were submitted. Only then, in its requested instruction No. 13, did the Government elect the theory on which it would proceed, i.e., that the Franklin-Wayne transaction was illegal because Franklin, rather than Wayne, was checking the credit on the mortgage applicants and "there would be no valid exercise of judgment on the part of a supervised lender that a particular mortgage loan application qualified for a government guaranty. . . ." (1747r).

An indictment which permitted the Government to make such a critical change of theory at the end of the trial was invalid for vagueness and failed to state an offense against the United States.

II.

The Problem of Vagueness of the Conspiracy Statute When Used in Conjunction with 38 U.S.C.A. 1802(d).

All the evils against which the "void for vagueness" doctrine is said to guard exist in "conspiracy to defraud the United States" as used in the indictment in conjunction with 38 U.S.C.A. 1802(d). The phrase certainly has no meaning which can be understood by "men of common intelligence." "[A] statute which either forbids or required the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violated the first essential of due process of law." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). The doctrine that a criminal statute, if sufficiently vague, violates the due process

clause of the fifth or fourteenth amendment has been developed in a long line of cases. In addition to *Connally*, supra, see *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Jordan* v. *DeGeorge*, 341 U.S. 223, 230 (1951); *Musser* v. *Utah*, 333 U.S. 95, 96-97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."); *Winters* v. *New York*, 333 U.S. 507, 518 (1948); *United States* v. *Petrillo*, 332 U.S. 1, 6-7 (1947); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 598-99 (D.C. Cir. 1910).

The conspiracy statute when used, as in this prosecution in combination with 18 U.S.C.A. 1802(d), the rules and regulations and 38 U.S.C.A. 1810(b)(2) and (3) (the credit and payment-income relationship) is not only on its face but also in its application to these defendants void for vagueness and hence, violative of the sixth amendment and the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States. For there is no notice to the defendants of any prohibition in the statute (1802(d)) nor the regulations forbidding "Franklin" from processing loans for and on behalf of "Wayne" (the accommodation relationship) nor are there sufficient standards and/or guides set forth as to credit and the payment-income relationship in section

1810(b) (2) and (3) or the rules and regulations of the Veterans Administration.

The use of Indefinite Terms in Statutes, 30 Yale L.J. 437 (1921); Note, Due Process Requirements of Definiteness in Statutes, 63 Harv. L. Rev. 77 (1948); Annot., 83 L.Ed. 893 (1939). *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.")

A corollary of the "vagueness" doctrine is the rule requiring that a criminal statute be strictly construed. For a discussion of that rule, and of state statutes seeking to codify it, see *Hall, "Strict or Liberal Construction of Penal Statutes"*, 48 Harv. L. Rev. 748 (1935).

Surprisingly, however, the Court has never passed on the constitutionality of the crime, although it came close in *U. S.* v. *Gradwell*, 243 U.S. 476 at 485. The one court of appeals discussion of the problem is hardly satisfactory. The court found the requirement of definition satisfied by the statute's use "of words [which have a] settled meaning or which indicate offenses well known to and defined by the common law." *Crawford* v. *United States*, 30 App. D.C. 1, 12 (D.C. Cir. 1907) (quoting from *Czarra* v. *Medical Supervisors*, 25 App. D.C. 443, 450 (D.C. Cir. 1905)), rev'd on other grounds, 212 U.S. 183 (1909); cf. *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926): "[T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . ., or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ."

But, were a man of "common intelligence" to search long and hard for the "settled meaning," he would discover that neither "conspiracy" nor "defraud" possess it. The only "settled" aspect of the words is that they were known and used at common law—but always as concepts which had within them growth principles as dynamic as the standard of care in torts.

The circuit court's opinion points to the paradox of treating words of "settled meaning" as general exceptions to the rule that the constutionality of a criminal statute depends upon its meaningfulness to the man of "common intelligence." The very body of law from which the ideal of definition is allegedly drawn—the Anglo-American common law of crimes—is itself the end result of a process of retroactive creation of crime by the judiciary to meet the needs of a society in transition, by expanding old categories and creating new ones. Concepts born of such a process may, of course, be as specifically defined as to be fashioned by a legislature.

Whatever the merits of facilitating civil recoveries for fraudulent schemes, it hardly seems defensible to frame legislation carrying a possible five-year sentence so that persons are invited to rely on its permissions as well as its prohibitions and then, after that reliance, to decide that they have come too close. Such an approach is the very negation of a fundamental tenet of criminal law in the western world: that no one be punished for conduct which has not been legislatively defined and classed as a crime in advance of its commission. *Hall,* Criminal Law, ch. 2 (1947); *Williams,* Criminal Law, ch. 12 (1953); cases cited note 127 supra; *Lambert* v. *California,* 355 U.S. 225, 228-29 (1957); *Screws* v. *United States,* 325 U.S. 91, 101-03 (1945); see *Commonwealth* v. *Donoghue,* 250 Ky.

343, 358, 63 S.W.2d 3, 9 (1933) (dissenting opinion) (discussing the ex post facto nature of conspiracy when it is construed to reach conduct not criminal at the time of its commission); *Sayre,* "Criminal Conspiracy," 35 Harv. L. Rev. 393, 413 (1922). Contrast with the basic western approach that of the doctrine of analogy, which explicitly sanctions extensions beyond the bounds of even the most liberal statutory interpretation and which was at one time very much in vogue in fascist and communist countries.

The notice-giving function reflected in this doctrine traces to several sources, some of which spring from the struggle for legislative supremacy and the faith in democracy implicit in that struggle.

But perhaps the most important source is the definition of crime as encompassing "mens rea." That concept represents the historic attempt of the criminal law to ensure that the offender is possessed of a state of mind which makes him deserving of blame and, hence, punishment. Whether this state of mind is found in intent or in some form of negligence, it depends upon the ability of the offender to anticipate the range of consequences likely to follow from action and to guard against, or refrain from, behavior likely to produce those consequences. The underlying assumption is utilitarian: that men are capable of choosing between alternative courses of conduct and that, in a significant number of cases, the threat of punishment will cause them to choose the lawful rather than the prohibited course.

Underlying this assumption is a second and perhaps more questionable assumption—that all men know the law (for, if they do not know it, how can they be deterred?). Thus far, knowledge has been imputed under what is, in essence, a doctrine of constructive notice. The

denial of ignorance of law as a defense rests upon the premise that the state has discharged its obligation by drafting a clearly defined statute reasonably available to those who would heed its warning. Opportunity for knowledge, and the attendant ability to make a reasoned choice, exist and need only be utilized.

Statutes cast in terms meaningful to men of "common intelligence" quite obviously discharge the notice-giving function assigned to them. The same is true of most crimes defined by words of "settled meaning." Those words ordinarily refer to conduct so clearly and so long condemned by the mores that reasonable men have come to know its outlines comparatively well. But what of conduct falling within terms of supposedly "settled meaning" but not clearly prohibited by the mores? Or prohibited by the mores of one subgroup within a culture but not of another? Or, indeed, conduct permitted by the mores? Quite obviously, as society becomes more complex and as criminal statutes proliferate to include "white collar crimes" and "public welfare offenses," the likelihood that potential offenders actually know what is criminal and what is not—merely because they live in society—becomes increasingly remote.

One can only surmise, of course, how many persons about to engage in conduct at or beyond the periphery of what is permissible are deterred from doing so by the threat of penalties contained in criminal statutes. It is quite reasonable to assume, however, that the further away the conduct is from violence, the more rational (and the more deterrable) is the offender to be dealt with. Certainly, those who agree to defraud are likely to be such men. Though it is possible that they will take precise definition as an invitation to evade, it is equally possible that adequate notice of the nature of the prohibited

conduct will deter them from pursuing it. Whatever the precise balance between these views, our system of criminal law is built upon the faith that men are rational and that a vaguely drawn statute will not give the potential offender his last clear chance to refrain from criminal conduct.

Precise definition serves other, equally important, ends. Nothing teaches better than the evolution of "defraud" the extent to which such a phrase invests police and prosecutor with a license to interfere with freedom of action in ways unanticipated by the legislature. Definition tends, therefore, to keep the power of arrest and of indictment within bounds and thereby to minimize discriminatory application of the criminal law. It also helps prevent tactical considerations from unduly influencing the trial process—something particularly likely to occur in a conspiracy trial—by furnishing standards to which prosecution and defense may look in preparing a case for trial; by affording the trial judge a manageable criterion for determining the relevance of evidence; and by permitting meaningful instructions to be given to the jury. The sixth amendment and the due process clauses of the fifth and fourteenth amendments provide the constitutional guide-lines for the requirement of definition, though considerable support is also to be found in common law and statute. See cases cited note 127 supra; *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948); *Berger* v. *United States,* 295 U.S. 78, 82 (1935); *United States* v. *Cruikshank,* 92 U.S. 542, 557-58 (1875); *Williams* v. *United States,* 164 F.2d 302, 304 (5th Cir. 1947); *Williams* v. *United States,* 131 F.2d 21, 23 (D.C. Cir. 1942); *McMullen* v. *United States,* 96 F.2d 574, 579 (D.C. Cir. 1938). The importance of "real notice" to the defendant is sometimes particularly emphasized in cases involving a defense made

without counsel, see *Smith* v. *O'Grady*, 312 U.S. 329, 333-34 (1941); *Ammons* v. *King*, 133 F.2d 270, 271-72 (8th Cir. 1943), although the doctrine may be invoked even when defendant is represented by counsel, see *Hallman* v. *United States*, 208 F.2d 825 (D.C. Cir. 1953).

There is still another reason for precise definition, one even more peculiarly associated with the intricacies of the conspiracy prosecution. Because conspiracy is a crime which may continue over a long period of time, each new act pursuant to the original agreement extending its life, it affords the overzealous prosecutor a unique invitation to by-pass prohibitions against double jeopardy. By the simple expedient of assigning different beginning dates to parts of what is really one conspiracy and attaching different sets of overt acts to each of these parts, he may create the illusion that that is discrete which is, in law, continuous. Considerable analysis and searching of two trial records may be required in order to determine whether an alleged conspiracy "A" is really the same, or part of, conspiracy "B." It may even become necessary to submit the issue to the jury. *Short* v. *United States*, 91 F.2d 614, 619-25 (4th Cir. 1937). If conspiracy "A" can be demonstrated to be part of, or identical with, conspiracy "B," then conviction or acquittal of one would appear to bar prosecution for the other. Similarly, if both are charged as separate counts in a single indictment and conviction on both ensues, there can properly be a sentence on only one of the counts. *United States* v. *Cohen*, 197 F.2d 26, 29 (3d Cir. 1952); *United States* v. *Anderson*, 101 F.2d 325, 333 (7th Cir.), cert. denied, 307 U.S. 625 (1939); *United States* v. *Mazzochi*, 75 F.2d 497-98 (2d Cir. 1935); *Bertsch* v. *Snook*, 36 F.2d 155, 156 (5th Cir. 1929); *Powe* v. *United States*, 11 F.2d 598, 599 (5th Cir. 1926); *Murphy* v. *United States*, 285 Fed. 801, 817

(7th Cir.), cert. denied, 261 U.S. 617 (1923); *United States* v. *Weiss*, 293 Fed. 992, 994 (N.D. Ill. 1928). It is not clear whether acquittal of conspiracy "A" because of insufficiency of evidence (at the close of the prosecution's case) will bar conviction of conspiracy "B," as charged in a separate count of the same indictment. *United States* v. *Klein*, 247 F.2d 908, 919 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958), suggests that there would be no bar. *United States* v. *Wills*, 36 F.2d 855, 856 (3d Cir. 1929), on the other hand, indicates the opposite. Cf. *Hughes* v. *United States*, 95 F.2d 538 (5th Cir. 1938), and consider whether the statement in this case may have overlooked the decision in *Dunn* v. *United States*, 284 U.S. 390 (1932).

The defendant is then faced with the almost impossible burden of demonstrating that the events, in fact, flow from a single agreement. Conspiracy to defraud the United States, built as it is upon circumstantial evidence and dependent for its meaning upon a vaguely defined object, lends itself to this type of problem, and to another as well. Even when no great multiplicity of acts or objects is involved, the imprecision of "defraud" enables the prosecutor to argue with ease that much of the evidence he offers to prove an "offense" (a false statement or bribe, for example) is also admissible to prove "defraud." Facts viewed against the latter standard always appear to disclose a plan that is somewhat different from that revealed under the former. *Glasser* v. *United States*, 315 U.S. 60, 66-67 (1942), is typical. In this case the Court, quoting from *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1939), said that it need not consider whether a charge of conspiracy to bribe was prohibited by cases holding that there can be no conspiracy to commit a crime which itself involves concerted action:

> "The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to . . . defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense."

Cf. *United States* v. *Weinberg*, 226 F.2d 161, 165 (3d Cir. 1955). Since that difference will probably satisfy the prevailing "same evidence" test of double jeopardy, the constitutional safeguard is likely to prove unavailing as a bar to subsequent indictments or to cumulative sentences.

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . . 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' "

Blockburger v. *United States*, 284 U.S. 299, 304 (1932). The test thus depends upon whether the statute requires the additional proof, not upon whether the same proof happens to be made in a given case. *Morgan* v. *Devine*, 237 U.S. 632, 641 (1915); *Gavieres* v. *United States*, 220 U.S. 338, 343 (1911); *Ex parte Nielsen*, 131 U.S. 176, 187-89 (1889); *Short* v. *United States*, 91 F.2d 614, 622 (4th Cir. 1937).

III.

The "Either"-"Or" Structure of the Statute Bars the Charging of an "Offense Conspiracy" and a "Defrauding Conspiracy"

Conspiracy is punishable if it contemplates "EITHER" an offense against the United States "OR" defrauding the United States. The first part of the conspiracy statute appears to incorporate agreements to commit every substantive crime created by Congress and every act to which Congress has attached a noncriminal penalty. Frauds which are also offenses could, therefore, be treated exclusively under the first half of the statute. The second half would then apply only to those frauds which are not denominated offenses by legislation other than the conspiracy statute. Conspiracy to defraud the United States could thus be restricted to those agreements which have as their object the perpetration of frauds upon the Government, and which are not subject to penalty when one person alone is involved, even if that person accomplishes his purpose.

If the two parts of the statute were so read—as mutually exclusive, the more specifically defined section to be applied if at all possible—the structure of the statute would be given effect and, at the same time, there would be an end to cloaking specific offenses with the mantle of fraud. Prosecutions would be brought either for conspiracy to commit an offense or for conspiracy to defraud, but for the latter only under circumstances in which no "offense" (or cluster of "offenses") covered the conduct in question.

The cases lend some support to the suggested reading of the statute. They say, for example, that it creates one offense, not two. (*May* v. *United States*, 175 F.2d

994, 1002 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949); *United States* v. *Manton,* 107 F.2d 834, 838 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940); see *Levitt,* Duplicity in Indictments Brought Under Section 37, Criminal Code of the United States, 6 Ill. L.Q. 135, 135-36, 144 (1923); cf. *State* v. *Hartung,* 239 Iowa 414, 428, 30 N.W.2d 491, 499 (1948).) That the allegation of a single agreement having several objects does not give rise to as many conspiracies as there are objects. *Braverman* v. *United States,* 317 U.S. 49, 53 (1942). Unless considerable weight was given the "either-or" structure of the general conspiracy statute, these decisions might well have accorded with the construction given the two conspiracy provisions of the Sherman Act. Under the latter, the same set of facts, evidencing a single agreement, may give rise to two offenses punishable cumulatively at the discretion of the trial judge. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 787-88 (1946); *Montrose Lumber Co.* v. *United States,* 124 F.2d 573, 575 (10th Cir. 1941); *United States* v. *Buchalter,* 88 F.2d 625, 628 (2d Cir.), cert. denied, 301 U.S. 708 (1937); cf. *United States* v. *Samuel Dunkel &* charged under what is now 18 U.S.C. §371 (1952), whereas U.S. 930 (1951). (note that the conspiracy to defraud was charged under what is now 18 U.S.C. §371 (1952), whereas the conspiracy to obtain payment by a false claim was charged under what is presently 18 U.S.C. §286 rather than under the "offense" portion of §371).

The reason given is that congressional enactment of two separate conspiracy provisions—one barring agreements in restraint of trade, the other agreements to monopolize, each of which hypothetically requires an element of proof different from the other—demonstrates an intention to create two crimes, to permit two prosecutions and to impose two sentences. Such a position could easily

have been taken under the general conspiracy statute, since the "fraud" part of it theoretically requires an element the "offense" portion does not. The fact that the cases arising under the general statute have avoided any multiplication of offense categories lends inferential support to a construction of the statute's two clauses as mutually exclusive.

When these arguments for an alternative reading are viewed in terms of the unique function which the general conspiracy statute has served in the federal criminal code, a meaningful pattern begins to emerge. The "defraud" language was used early in the statute's history primarily to reach conduct which fell outside the "ordinary" meaning of fraud but which had not yet been made an "offense" by Congress. Operationally, then, the "defraud" portion of the statute has served as an interim measure protecting the Government until such time as Congress has been able to deal more specifically with a given problem. If the statute were now read as it has in fact been applied, courts would find in its alternative structure a means of checking the growth of the "defraud" portion. This reading would treat the congressional creation of a specific offense out of conduct previously reachable only if termed "defrauding" as an expression of legislative intent to remove the conduct from the category of "defraud."

Identical ends could be attained by invoking the doctrine of "pro tanto" repeal by implication, a doctrine which is, essentially, a rule of statutory construction. It operates to assign each new piece of legislation an appropriate place in the body of statutes, to erase those parts of older statutes overlapped by more recent provisions, and to leave only such portions of the old as are not reached by the new. Under this doctrine, the scope of conspiracy to defraud the United States would narrow,

for example, the moment an income-tax-evasion statute was enacted: a conspiracy to defraud the Treasury of income taxes would no longer violate the "defraud" portion of the statute; it would violate only the "offense" portion. True, the courts have said time and again that repeals by implication are not favored, that they constitute judicial usurpation of a legislative prerogative. *But finding a statute to have been repealed by implication may be essential to prevent continued abdication of the judiciary's constitutional function in the double-jeopardy field.* The courts' traditional measure of the prohibition against double jeopardy, the "same evidence" test, finds the constitutional guarantee honored so long as Congress adds a hypothetically different element of proof to an existing criminal category. Thus, if a general prohibition against false statements does not require that untrue information given to the Internal Revenue Department have any impact on the ascertainment of tax liability, and if, under the separate offense of income tax evasion, such a prejudicial effect must be shown, the fact that the identical false statement is charged in each case will not bar two prosecutions, two convictions and two sentences. Similarly, "commit any offense" and "defraud the United States" are, in theory, different enough to allow two separate prosecutions, *although—as when false statements are involved—proof offered in both prosecutions might well be identical. Currently the only limits on this result are the inadequate ones to be found in the cases dealing with res judicata and cruel and unusual punishment.* (For application of res judicata (or collateral estoppel) to criminal law, see *Sealfon* v. *United States,* 332 U.S. 575, 578 (1948); *Lugar,* Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317, 329-44 (1954); *Kirchheimer,* supra, note 124, at 532-33; Developments in

the Law—Res Judicata, 65 Harv. L. Rev. 818, 874-78 (1952); Annot., 147 A.L.R. 991 (1943). For discussion of the eighth amendment's prohibition against cruel and unusual punishment, see *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947); *Trop* v. *Dulles,* 356 U.S. 86, 99-104 (1958).)

Nonetheless, absent express legislation to the contrary, it seems unreasonable to assume that Congress regularly intends to pile one penalty upon another already established for substantially similar conduct or directed at a substantially similar evil. Far more logical and far more consistent with the moral considerations implicit in double jeopardy is the rule of construction that, when the legislature deals more specifically than in the past with a given kind of antisocial conduct, it intends the new enactment to supercede the old standard of criminality and the old penalty attached to it, at least to the extent that the new covers the same area as the old.

Reading such an intent into the conspiracy statute would produce a result substantially identical with that of the "operational" interpretation previously described. The threat of sanction would still attend the entire range of fraudulent plans directed against the Government. In each case, however, the determination would have to be made whether, on the facts at hand, Congress had dealt specifically with the subject-matter of the conspiracy. If it had, then the "defraud" provision could not be applied and prosecution would have to be brought under the "offense" portion of the statute. The focus of judicial inquiry would be placed squarely where it belongs—on congressional intent and the harm sought to be reached by the legislature.

To ensure that what is charged under the second half of the conspiracy statute could not have been charged

under the first half, courts should invoke the principle that, if the object of the conspiracy is not a substantive crime, the indictment must set forth the allegedly unlawful purpose with the utmost particularity. The "void for vagueness" doctrine seems to have made its appearance as part of the due process clauses of the fifth and fourteenth amendments in the early part of the twentieth century. Before that time, what might today be classed as an unconstitutionally vague statute was sometimes saved by requiring the Government to specify in the indictment the kind of conduct alleged to be criminal. This satisfied the sixth amendment, which is concerned only with the notice-giving function of the indictment. See, e.g., *United States* v. *Cruikshank*, 92 U.S. 542, 588-59 (1875):

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars."

Id. at 558. Where the crime charged in the indictment was conspiracy for a criminal purpose, it sufficed to state the purpose, "while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out." *Pettibone* v. *United States*, 148 U.S. 197, 203 (1893); accord, *United States* v. *Atlanta Journal Co.*, 185 Fed. 656, 662-63 (C.C.D. Ga. 1910), appeal dismissed, 229 U.S. 605 (1913); *United States* v. *Walsh*, 28 Fed. Cas. 394, 396 (No. 16636) (C.C.E.D. Mo. 1878); *Commonwealth* v. *Eastman*, 55 Mass. 189, 203-06 (1848); *Commonwealth* v. *Hunt*, 45 Mass. 111, 125-26 (1842).

Snce there is no general offense of "defrauding the United States," except when two persons, in agreement, intend it, the coexistence of "offense" and "defraud" as alternative objects of conspiracy would require that conspiracy to "defraud" always reach something more than conspiracy to commit an "offense." If all frauds were found to have been made offenses, the second part of the conspiracy statute would then have no reason for being —as might indeed prove to be the case. Though it is not as clear that conspiracy to defraud would reach more than conspiracy to commit the offense of filing a false statement—since the language of the false statement provision, section 1001 of title 18, reaches not only affirmative misstatements but also willful failure to speak. See the broad construction given the forerunner of 18 U.S.C. §1001 (1952) in *United States* v. *Gilliland,* 312 U.S. 86, 93 (1941) (Congress intended "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described [i.e., false and fraudulent statements]."). Compare the admonition of the trial judge in the same case, warning against the adoption of a construction tied so loosely to the "operations of the innumerable and ever growing departments, bureaus, and agencies of the Government." *United States* v. *Gilliland,* 35 F. Supp. 181, 187 (E.D. Tex. 1940)—the cases brought under section 1001 seem invariably to involve the filing of a document or the making of a statement to a particular governmental official. None predicate liability upon concealment in the absence of a statutory obligation to disclose or of some direct-dealing relationship between the defendant and the Government. And virtually none involve nondisclosure except when it accompanies some submission of data.

CONCLUSION

For the foregoing reasons, Petitioner urges that the Petition for the Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to the following: Solicitor General, Department of Justice, Washington, D. C. 20530; Dykema, Wheat, Spencer, Goodnow & Trigg, 2700 Penobscot Building, Detroit, Michigan 48226; Messrs. Edward Bennett Williams and Patrick M. Wall, 1000 Hill Street, Washington, D. C. 20006; Messrs. Joseph W. Louisell and Ivan E. Barris, 2066 Penobscot Building, Detroit, Michigan 48226; Mr. Sidney E. Pollick, 2161 Guardian Building, Detroit, Michigan 48226; Mr. Robert J. Grace, United States Attorney, 817 Federal Building, Detroit, Michigan 48226; Mr. Marvin R. Loewy, Department of Justice, Criminal Division, Wash-

ington, D. C.; Mr. Russell M. Paquette, Veterans Administration, 210 Gratiot Avenue, Detroit, Michigan; and to Mr. Carl W. Reuss, Clerk, United States Court of Appeals, Sixth Circuit, Cincinnati, Ohio 45202, this 28th day of January, 1969.

CYRIL ABRAMSON
Of Counsel for Petitioner,
Ross Howard

APPENDIX A

Nos. 18204, 18205, 18206, 18207

United States Court of Appeals

FOR THE SIXTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

BENJAMIN LEVINSON,
FRANKLIN MORTGAGE CORPORATION,
EDWARD P. STRANG, JR.,
ROSS HOWARD,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided December 30, 1968.

(Filed December 30, 1969. Carl W. Reuss, Clerk.)

Before: PHILLIPS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Edward P. Strang, Jr., Ross Howard, Franklin Mortgage Corporation and Benjamin Levinson, defendants-appellants herein, appeal from judgment of conviction in the United States District Court for the Eastern District of Michigan. The essence of the offense of which the appellants were convicted, as charged in the first count of the indictment, was a conspiracy to defraud the United States through the Veterans Administration, an agency of the United States, by preventing the Veterans Administration from having its loan guaranty program administered in accordance with the provisions of Section 1801 et seq., Title 18, U.S.C. and the rules and

regulations promulgated thereunder. Although the indictment contained 33 counts, the trial judge severed counts 26 through 33 from the instant trial. The substantive offenses charged in counts 2 through 25 of the indictment stem from the alleged conspiracy in the first count.

In addition to the appellants herein, Richard David Mitchell, Richard E. Medinis, Thomas Whitford and Rem Realty Company, a Michigan corporation, were also indicted in the first count of the indictment. Robert Cerwin, an employee of Franklin Mortgage Corporation, was named as a co-conspirator but was not indicted. Rem Realty Company became defunct as a corporation and was dismissed before trial. Richard E. Medinis pleaded guilty and Thomas Whitford was dismissed at the close of the government's case. Richard David Mitchell was convicted but is now deceased.

Counts 2 to 5, 8 to 10 and 12 to 15 charged Levinson, Franklin, Strang, Mitchell, Medinis, Rem Realty and Howard with specific violations of Section 1001,[1] Title 18, U.S.C. Counts 6, 7, 16 and 17 charged Levinson, Franklin and Howard with specific violations of Section 1001. Count 11 charged Levinson, Franklin and Strang with a violation of Section 1001. Counts 18 and 19 charged Medinis, Mitchell, Rem Realty and Whitford with specific violations of Section 1001. Counts 20 to 25 charged Mitchell, Medinis and Rem Realty with violations of Section 1001. The severed counts of the indictment, Nos. 26

1. "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

through 33, involve similar conspiracy and substantive offenses relative to the loan program of the Federal Housing Administration (FHA).

The case was tried before a jury and all of the defendants, except Whitford, Rem Realty and Medinis, were convicted on all of the counts of the indictment. The trial judge sentenced Franklin to pay a $10,000 fine, and sentenced Levinson, Strang and Howard each to pay a $10,000 fine and to 18 months' imprisonment upon their pleas "of not guilty and verdict(s) of guilty of the offense of conspiracy; false statements to obtain VA loans; aiding and abetting; in violation of Sections 371, 1001 and 2, Title 18, U.S.C., as charged in the indictment; . . ."

The Veterans Administration's home loan program is based upon Section 1801 et seq., Title 38, U.S.C., and the regulations promulgated thereunder. The statutory plans provide for the issuance by the VA of guaranties on mortgage loans made to veterans. To participate in this program a veteran must have been discharged under other than dishonorable conditions and have served a minimum of ninety days' service. Section 1810(b) states that no loan may be guaranteed unless

> "(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;
>
> "(2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses;
>
> "(3) the veteran is a satisfactory credit risk;
>
> "(4) the nature and condition of the property is such as to be suitable for dwelling purposes;

"(5) the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof as determined by the Administrator; and

"(6) if the loan is for repair, alteration or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property."

Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Section 1802(d) provides for the issuance of automatic guaranties on loans made by "supervised lenders." A "supervised lender" is generally any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Wayne National Life Insurance Company qualified as a "supervised lender" because it was an insurance company subject to the supervision of the Michigan Insurance Commissioner. It is the responsibility of the supervised lender to determine whether the loan meets the requirements of the statute and regulations. Section 1032, Veterans Administration Regulations.

Unlike supervised lenders, whose loans are automatically guaranteed by the VA, "non-supervised lenders" must seek guaranties on the "prior approval basis." A "non-supervised lender" is one that is not subject to the supervision of a federal or state agency. Franklin Mortgage Corporation was a non-supervised lender. Under the "prior approval basis" of obtaining guaranties, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. The VA would make this determination on the basis of the pertinent information required to be submitted to it by the lender. If the loan is

held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA who issues its guaranty.

The benefits of obtaining guaranties on the automatic basis are twofold. It relieves the VA of the necessity of making a detailed and lengthy study of the loan application to see if it qualifies for a guaranty. This responsibility is assumed by the supervised lender who certifies that "the loan conforms otherwise with the applicable provisions of 38 U.S.C., Chapter 37, and of the regulations concerning guaranty of insurance of loans to veterans." Because the VA does not make the determination of eligibility, the guaranties are issued much sooner than if the application had been submitted on a prior approval basis.

Appellants Strang and Howard contend that the conspiracy count of the indictment, Count one, is defective and insufficient and should have been quashed. Both of these appellants made pre-trial motions to this effect which were denied by the trial judge. The decisions of the Supreme Court make it clear that a valid indictment must fulfill two distinct functions. First, an indictment must inform the accused of the nature of the charges against him, with such specificity and particularity that the accused is enabled to undertake and prepare an adequate defense. Second, an indictment must be so framed that it should be evident to what extent a plea of double jeopardy is available to the accused in the event of future charges involving similar offenses. *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427; *Russell* v. *United States*, 369 U.S. 749.

Although an indictment is subject to careful examination to assure conformity with the strict requirements

mentioned above, not all lapses from precision and correctness require that an indictment be quashed. Nonprejudicial errors and defects do not invalidate indictments which otherwise fulfill the two prime requisites of informing the accused of the nature of the charge and defining the scope of a future plea of double jeopardy. *Smith* v. *United States,* 360 U.S. 1; *Williams* v. *United States,* 341 U.S. 97. The essence of this principle is found in Rule 52(a) of the Federal Rules of Criminal Procedure which states that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Rule 7(c) of the F.R.Crim.P. provides that "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In addition to stating the specific statutory violation alleged, the indictment must indicate the manner in which the alleged violation occurred and the essential factual allegations in support thereof. An indictment which does not mislead the accused as to the nature of the offense charged, enables him to prepare an adequate defense and is specific enough to prevent future prosecutions for the same offense, is valid in spite of any minor deficiencies or technical errors.

Count one of the indictment charged the defendants with a violation of Section 371, Title 18, U.S.C., the general conspiracy section. Section 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This section provides criminal sanctions for two distinct types of conspiratorial action. The first, involving a conspiracy to "commit any offense" against the United States, concerns conspiracies having as their object the commission of unlawful acts subject to criminal prosecution or suit for penalty. *United States* v. *Hutto,* 256 U.S. 524. The second prong of the general conspiracy section, involving a conspiracy "to defraud the United States," includes conspiracies having as their purpose impairing, obstructing or defeating the lawful function of any department of government. *Haas* v. *Henkel,* 216 U.S. 462.

Count one of the present indictment charges that the defendants

> "'. . . did in violation of Title 18, U.S.C., Section 371, unlawfully, wilfully, knowingly and feloniously conspire between and among themselves, and with others to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to defraud the United States of America, in particular the Veterans Administration, an agency of the United States of America, of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder, and to violate Section 1001, Title 18, United States Code."

This indictment is admittedly artlessly framed by charging defendants with a conspiracy to commit the offense of defrauding the United States by failing to adhere to the provisions of Section 1801 et seq. Section 1801 et seq. does not create a substantive criminal offense or provide a penalty for failure to follow its prescriptions. Thus, if the indictment is read literally under the "offense" portion of Section 371 a conspiracy to commit an "offense" is not properly alleged. But such a literal reading of the

indictment does damage to the plain and obvious meaning it was intended to impart. It is obvious that what was meant to be charged was a conspiracy to defend the United States. The words "to commit offenses against the United States of America, to-wit:" are, in regard to this portion of the indictment, mere surplusage and can be ignored. *United States* v. *Vazquez,* 319 F.2d 381 (C.A. 3), cert. den. 385 U.S. 846. "The insertion of surplus words in the indictment does not change the nature of the offense charged." *Bridges* v. *United States,* 346 U.S. 209, 223. See also, *Bary* v. *United States,* 292 F.2d 53 (C.A. 10); *United States* v. *Chunn,* 347 F.2d 717 (C.A. 4). These words, which are surplusage with respect to the "defraud" portion of the indictment, more properly belong with the part of the indictment which charges defendants with conspiring to "violate Section 1001, Title 18, United States Code." Count one of the indictment makes it evident and clear that the defendants are charged with a conspiracy to defraud the United States and to commit offenses against the United States in violation of Section 1001, Title 18, U.S.C. There can be no misunderstanding of the nature of the charges and consequently no resulting prejudice to the defendants.

Appellants further argue that the portion of Count one charging a conspiracy to violate Section 1001, Title 18, U.S.C., is insufficient because it merely cites the substantive crime which was the object of the alleged conspiracy. If all that Count one of the indictment contained was a simple allegation that defendants conspired to violate a particular provision of the criminal code, appellants' position would be correct. However, paragraph four of Count one states that

> "It was a further part of said conspiracy that the defendants would submit and cause to be submitted,

> the following loan documents and reports, among others, to the Veterans Administration . . . which loan documents contained false and fraudulent statements. . . ."

This paragraph defines that portion of the conspiracy dealing with the violation of Section 1001.

Appellants challenge the sufficiency of paragraph four arguing that it merely alleges what was done instead of what was agreed to be done. However paragraph four specifically alleges that as part of the conspiracy the defendants "would submit, and cause to be submitted," false and fraudulent documents.

The statement in the indictment that the defendants conspired to defraud the United States "of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38, United States Code, and the rules and regulations promulgated thereunder" is a clear and definite statement of the governmental function which the defendants allegedly conspired to obstruct and impair. We hold that the indictment is not vague or ambiguous and thus satisfies the requirements of the Sixth Amendment.

The following statement by the Supreme Court in *United States* v. *Debrow, supra,* at 377-378, is relevant to the alleged insufficiency and invalidity of the present indictment:

> "The charges of the indictment followed substantially the wording of the statute which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to

the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7(f), F.R. Crim.Proc."

We hold that the indictment is sufficient and does not violate the Fifth or Sixth Amendments to the Constitution.

It is claimed on behalf of Strang that his constitutional rights were violated by denying him the right to counsel in the grand jury room during his interrogation; that government counsel failed to advise him of his right to counsel before testifying and to have counsel present outside the grand jury room for purposes of consultation; and that he was subpoenaed and questioned without giving notice to his counsel. It is argued that because of these violations the indictment should be dismissed as to Strang either because of the alleged constitutional violations or by reason of the Court's supervisory power over federal law enforcement. The question was raised by a motion before trial to dismiss the indictment. The motion was denied.

The appellant, Edward P. Strang, Jr., was president of Wayne National Life Insurance Company. It was the arrangement between Wayne and Franklin, which we will hereinafter discuss, that gave rise to the conspiracy and other charges herein involved. Strang while under investigation of the charges for which he was later indicted was called to testify before the grand jury concerning the case about which he was being investigated.

It appears from the record before us that Strang had a conversation with Mr. Barton W. Morris, assistant

United States Attorney, before entering the grand jury room and was advised that anything he said could be used against him and that he did not have to testify to anything that might incriminate him. The same admonition was given to him in the grand jury room after he was sworn. In his conversation with Mr. Morris, Strang asked if he could have his lawyer with him in the grand jury room and was told that he could not. Before entering the grand jury room Strang knew what the investigation was about and of the possible involvement of himself and Wayne. For sometime prior to his appearance before the grand jury he had consulted with five lawyers and there is evidence that he knew for two days that a subpoena had been issued for him to testify before the grand jury. Before entering the grand jury room Strang requested and received permission to make a telephone call.

It has been recognized that a potential defendant may be subpoenaed to testify before a grand jury. *United States* v. *Clearly,* 265 F.2d 459 (C.A. 2), cert. den. 360 U.S. 936; *United States* v. *Winter,* 348 F.2d 204 (C.A. 2), cert. den. 382 U.S. 955. See also, *United States* v. *Luxenberg,* 374 F.2d 241 (C.A. 6). Rule 6(d) F.R.Crim.P. provides:

> "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

It has never been held except in *Sheridan* v. *Garrison,* 273 F.Supp. 673 (E.D.La.), that a witness, whether a potential defendant or not, has a constitutional right to have

a lawyer present with him in the grand jury room. The grand jury is an ancient institution and the only agency of our jurisprudence that is secretive. Its proceedings are not adversary. Its function is only investigative. It does not determine guilt or innocence. It determines only whether there is sufficient evidence to cause an accused to stand trial before a petit jury. There is no right of an accused to cross-examine witnesses or to introduce evidence in rebuttal. The grand jury has in all ages stood between the accused and his unjust accusers. One accused of crime may oftentimes, by himself testifying before the grand jury, clear up the charges against him so that no indictment is returned. Strang told Mr. Morris that he would testify voluntarily and may well have had the hope that he could explain his part in the Wayne-Franklin affair.

Admittedly *Escobedo, Miranda* and *Wade*[2] are not factually analogous to Strang's position in the case at bar. We are unwilling to extend the principle of those cases to the right of a potential defendant to have a lawyer present with him in the grand jury room. There are other means of protecting a defendant from abuse of power of a prosecutor or from a violation of constitutional rights.

There was no obligation on the part of the government counsel to notify Strang's counsel that Strang was subpoenaed before the grand jury. Strang himself had ample opportunity to do that. He was never denied the right to have his lawyer accompany him to the door of the grand jury room and to have him wait outside while he was testifying. He was given permission to use the

2. *Escobedo* v. *Ill.*, 378 U.S. 478; *Miranda* v. *Arizona*, 384 U.S. 436; *United States* v. *Wade*, 388 U.S. 218.

telephone before going into the grand jury room and he was free to have called his lawyer then if he wished to consult with him.

Prior to trial, appellant Strang filed a motion under Rule 6(e)[3] of the F.R.Crim.P. to inspect the minutes of the Grand Jury. In support thereof Strang stated:

> "On December 27, 1965, defendant filed a Motion to Dismiss, in which he alleged violation of his constitutional rights, both with respect to the Grand Jury Proceedings which led to the founding of the Indictment and to the Indictment itself, and in which he alleged that the form and manner in which he was questioned before the Grand Jury prejudiced him in the eyes of the Grand Jury, thereby inducing the return of the indictment against him. Such Motion to Dismiss is hereby incorporated in this Motion."

The motion to dismiss alleged that Strang's constitutional rights "not to be a witness against himself" and to "have the assistance of counsel for his defense" were violated. The statement in his motion for inspection of the grand jury minutes concerning the manner in which he was questioned before the grand jury is taken almost verbatim from the motion to dismiss. The government submitted the transcript of Strang's appearance before the grand jury to the trial judge for an *in camera* inspection. The judge denied the motion. On appeal Strang only assigns as error the refusal of the trial judge to permit inspection of his own testimony before the grand jury.

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3. "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

The government concedes that under present Rule 16(a) (3),[4] effective July 1, 1966, the defendant would have been entitled to make such an inspection. However, the trial of this case was begun prior to the effective date of amended Rule 16, and is governed by the then prevailing law. Only upon a showing of a "particularized need" by a defendant, may a trial court intrude upon the secrecy of the grand jury proceedings and permit inspection of its minutes. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, rehearing den. 361 U.S. 855; *Dennis* v. *United States,* 384 U.S. 855. The rule requiring a demonstration of a "particularized need," prior to July 1966, applied equally to testimony of the defendant himself as well as other witnesses. It is within the trial judge's discretion to grant or deny a request for inspection of grand jury minutes and a denial of such a request is reversible only if the trial judge abused his discretion.

Nothing in the grand jury minutes would shed any light on Strang's contention that he was denied his constitutional right to counsel before the grand jury. It is undisputed that he did not have one in the grand jury room with him when he was testifying. His request concerning counsel made to the prosecutor and the prosecutor's response thereto were not part of the grand jury proceedings and would not be contained in the minutes. It is also undisputed that the prosecutor advised Strang, outside of the grand jury room, of his right not to incriminate himself. The trial judge quoted the applicable portion of the grand jury minutes wherein Strang was advised of his right not to incriminate himself in his

4. "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

memorandum opinion overruling Strang's motion to quash the indictment. No additional information concerning the alleged violation of his right not to be a witness against himself could be gleaned from inspecting the minutes.

Other than the mere conclusory statement in both the motion to dismiss the indictment and the motion to inspect the grand jury minutes that the form and manner in which Strang was questioned before the grand jury was prejudicial, there is nothing to support such an assertion.

Under these circumstances we think that no "particularized need" was demonstrated which would permit the trial judge to allow an inspection of the testimony of Strang before the grand jury. The resolution of the issue was within the discretion of the trial judge and we hold that his discretion was not abused.

We consider next the question of the sufficiency of the evidence raised by appellants Strang and Howard. Because of the complicated and involved nature of the transactions with which we are concerned, it is necessary to present the following somewhat detailed statement of facts.

Franklin is a Michigan Corporation, located in Detroit, whose business is the processing, closing and servicing of real estate mortgages, principally those insured by the FHA or guaranteed by the VA. Levinson is its president and major stockholder. Howard, who began working for Franklin in September, 1962, had the title of Executive Assistant. Cerwin, one of the principal government witnesses, became vice-president of Franklin in February, 1962. Franklin, as a "non-supervised" lender, was only able to secure VA guaranties on the prior approval basis. In 1962, and prior thereto, Franklin was

having difficulty in getting guaranties on some of the loan applications it submitted to the VA because the veterans were poor credit risks. In early 1962, Cerwin met with Paul Kelly, head of the loan guaranty division of the Detroit VA office, in Kelly's office. Kelly told Cerwin that some of Franklin's loans were poor risks and requested Franklin not to burden the VA with such unnecessary work.

In 1962 Franklin became aware of the process of obtaining VA guaranties on an "automatic basis." Thereafter it entered into accommodation arrangements with "supervised" lenders who could automatically secure VA guaranties. Under these arrangements Franklin would process loan applications and submit them to the supervised lender who would make an independent check of the application to see if it conformed with the applicable statutes and regulations, and to determine if the veteran was a satisfactory credit risk. Upon approval of the loan, the loan would be closed by the "supervised" lender who would apply for an "automatic" guaranty from the VA. After receiving the guaranty, the supervised lender would assign the mortgage back to Franklin. Such accommodation arrangements, wherein the "supervised" lender made an independent check of the veteran's credit and qualifications, were not illegal prior to June, 1963.

The "supervised" lenders were rejecting some of the loans submitted to them by Franklin and indicated to Franklin that they would not renew their arrangements and commitments after the expiration of their terms. In August, 1962, Kelly wrote a long letter to Levinson dealing with Franklin's deficiencies in connection with submissions to the VA of 48 cases submitted through a supervised lender. Because Franklin needed new "auto-

matic" sources through which to process VA loans, Levinson directed Howard to seek out supervised lenders who would be interested in entering into such accommodation arrangements.

In early December, 1962, Howard contacted Edward P. Strang, President of Wayne National Life Insurance Company, a small company with its office in Detroit, Michigan. Harold Bayer was General Counsel of Wayne, an officer, and a member of the Board of Directors and the finance committee. Kenneth Koppin was Executive Vice President of Wayne and managed the everyday affairs of the company. After Howard explained to Strang that Wayne could process VA mortgages on an automatic guaranty basis, Howard arranged a meeting between Strang and Levinson.

In mid-December, 1962, Strang met with Levinson, Howard and Cerwin at Franklin's offices. The nature of the VA loan guaranty program was explained to Strang and discussed. A subsequent meeting was held several days later. It was agreed at these meetings that Franklin would originate and process approximately $200,000 worth of loans to be made by Wayne who would submit them to the VA for automatic guaranties. After receiving the guaranty, Wayne would assign the loans to Franklin. Wayne would receive a 1% fee on the closing and a 1% fee on the assignment of the loan to Franklin. A contract dated December 20, 1962, and signed by Strang on behalf of Wayne, and Levinson on behalf of Franklin, outlined several portions of the agreement between the parties. The government has not contended and does not contend that this written agreement violates the law.

Cerwin testified that it was agreed between Wayne and Franklin that Wayne's sole task was to supply the

money and obtain the VA guaranty in its name, and that Franklin would attend to all the details, including the credit check. Strang's statement which he made to the FBI is to the same effect. Levinson disagreed with this characterization of the arrangement and testified that it was his understanding that Wayne would perform the credit analyses as did the other supervised lenders with whom Franklin had accommodation arrangements.

On December 21, 1962, Strang, in agreement with Koppin, discussed the desirability and legality of the contract with Bayer. Strang informed Bayer of the nature of the agreement and the VA loan guaranty program. According to Strang, he submitted the matter to Bayer for his review and approval. However, Strang neglected to inform either Koppin or Bayer that he had already signed the agreement with Franklin on the preceding day. Furthermore, he did not inform them that he had also signed a letter, dated December 21, 1962, to Levinson authorizing Franklin to close 22 loans at 91% of par.

In order to submit loans to the VA through Wayne, Levinson contacted Mitchell of Rem Realty and told him to bring down some business as Franklin had a new source who could secure guaranties on the automatic basis. Rem Realty Company was a Michigan corporation whose main business was to buy old houses in the run-down inner city area and try to sell them to veterans in hopes of obtaining a VA loan guaranty. Mitchell and Medinis were the principal stockholders of Rem, but because of their prior involvement with bankrupt operations, had others pose as the officers and directors of Rem. Rem falsified the credit reports of veterans in the hope that the applications would then be accepted for a VA guaranty. Cerwin who was present when Levinson telephoned Mitchell, testified that Levinson told Mitchell that the new source

for VA guaranties "would take anything" regardless of the credit of the veterans, including "derogs." "Derogs" is a term used in the mortgage business to refer to derogatory or poor credit risks. Mitchell told Medinis to take all VA cases, regardless of anything, over to Levinson. Medinis and Mitchell brought approximately 12 to 15 cases to Franklin's office, which they characterized to Cerwin and Dorothy Stuart, Cerwin's secretary, as bad risks and "garbage," another term in the mortgage business meaning poor credit risks. Cerwin told Levinson that the Rem loans were poor credit risks and that Franklin was looking for trouble if they submitted them to the VA. Levinson ordered Cerwin to process them anyway. Levinson denied everything except telling Mitchell to bring in some cases as they had a new source.

Approximately 22 loans, 15 of which were from Rem, were "closed" between December 26th and December 31, 1962. The loans were closed at the offices of Burton Abstract Company. Inasmuch as Wayne had not yet authorized the disbursement of funds to cover the loans, the closing papers were signed by the respective parties and held in escrow by Burton. The "closings" were most unusual in that they were completed before the loans were processed and before they were submitted to a "supervised" lender for an independent credit check and approval. The papers for the "closing" were all prepared at the offices of Franklin. In connection with the submission of the loans to the VA, false information concerning the credit of the veterans was prepared and the signatures of numerous veteran borrowers and Strang were forged. Dorothy Stuart, Cerwin's secretary, testified that both Cerwin and Howard directed her to sign the names of Strang and the veteran borrowers to various documents that were thereafter submitted to the V.A.

She was further told by both Cerwin and Howard that Strang had authorized the signing of his name. Howard and Cerwin denied this.

A partial disbursement of Wayne funds was made by check dated January 4, 1963, and negotiated on January 7th, both prior to any formal approval of the loans by Bayer. Contrary to Strang's intimations, this initial disbursement was prior to any authorization by Bayer. Koppin signed the check at his home where it had been brought by Nancy Murray, a Wayne secretary, and Howard. Koppin testified that he signed the checks on the assurances of Strang that it was a transaction separate from the Franklin arrangement and involved "good" mortgages. He further stated that had he known that the check was in connection with the Franklin arrangement he would not have signed it because Bayer had not yet given his approval. This disbursement was made out of additional funds Wayne had available for investment.

On January 8, 1963, after the loans had been closed in escrow and after an initial disbursement had been made thereon, Cerwin and another Franklin employee brought the files of the cases to Bayer's office. Cerwin testified that Strang, who arrived shortly after he did, made the statement that they were going to go through the motions of approving the loans. At this meeting and one held the following day, Bayer would not authorize the disbursement of Wayne funds unless Franklin executed an unconditional agreement to buy back any mortgage that the VA refused to guarantee. Cerwin said such an agreement was satisfactory but that Levinson had to sign it. Thereupon, Bayer authorized the disbursement of funds to cover the first group of closed loans. Levinson at first signed the agreement, but thereafter excised his signature. When Bayer learned of this, he wrote Strang and

advised him that he was not in favor of this arrangement with Franklin unless they had such an agreement and questioned whether Franklin was the "type of company we wish to do business with." Howard later signed a buy-back agreement telling Bayer that he was not an officer of Franklin and that he had no authority to sign the agreement. Bayer then authorized the disbursement of the balance of the funds, and never formally revoked his authorization.

Sometime in January, 1963, Levinson suggested to Strang that an extra point be paid upon the closing of the loan. Levinson testified that Mitchell told him that Rem was very anxious to close the deals and would be willing to pay an extra point to expedite the matter. Strang agreed and told Levinson to pay part of the extra-point moneys to him personally and part to the First Fidelity Corporation, a family-owned corporation of which Strang was a major stockholder.

Late in January and early February 1963, the first loan packages were sent to the VA for its guaranties. Franklin made the actual submissions but accompanied them with a covering letter on Wayne stationery. Strang had sent Wayne stationery over to Franklin's office, and told Dorothy Stuart to contact his secretary when she needed more. In early February 1963, the VA approved Wayne as a "supervised lender" under its guaranty program. At this point the VA was not aware of Franklin's interest in the loans. An examination of the loan packages by the VA indicated that most were poor credit risks and the proper standards had not been followed. Seven of the 22 applications submitted by Wayne were

rejected by the VA.[5] Kelly, loan guaranty officer at the Detroit office of the VA, asked another employee to arrange for Strang to come to their office and discuss the loan program. Strang declined to go but sent his personal secretary, Arnold Tunesi. Howard accompanied him. Strang told Howard not to reveal that Howard was associated with Franklin. Howard introduced himself at the VA as "Mr. Ross." A VA official lectured Tunesi and Howard about the bad credit risks being submitted by Wayne. This meeting was followed by a letter to Strang, three weeks later, explaining in detail the objections of the VA and warning that if Wayne's performance did not improve, it would be placed on a "prior approval" basis.[6]

On March 1, 1963, Strang resigned as President of Wayne, but remained on its Board of Directors and its Finance Committee.

It is apparently conceded by all that conviction on the substantive counts of the indictment is contingent upon a finding that the appellants were members of a conspiracy and that the acts which are the subject of the substantive charges were committed in furtherance of the conspiracy. It is conceded that there are false and fraudulent statements contained in the documents submitted to VA.

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5. The VA's rejection of seven of Wayne's applications for guaranties was based on the following statement from the Veterans Administration Lenders Handbook, Section 1032:

> "In the absence of fraud or material misrepresentations, the VA will not substitute its judgment for the lender's as to the credit risk assumed in any particular case nor question the validity of a guaranty already issued."

6. "If after a reasonable period the lender fails to demonstrate satisfactory performance, consideration will be given to the possibility of requiring prior approval for all future loans." Veterans Administration Lenders Handbook, Section 1032.

Strang contends that the agreement between Wayne and Franklin was not illegal and therefore he could not be guilty as charged. The government concedes that accommodation arrangements between "supervised" and "non-supervised" lenders were not inherently illegal at the time of the transactions involved herein.[7] The government does not contend that the written agreement dated December 20, 1962, between Franklin and Wayne violates the law. Rather it is the government's position that Levinson, Franklin, Howard, Strang and the other conspirators went beyond the bounds of legal action and conspired to defraud the United States of the lawful operation of its VA home loan guaranty program by submitting to the VA for automatic guaranty, through Wayne, a "supervised" lender, loans which the parties knew did not meet the requirements of Section 1801 et seq. and the rules and regulations promulgated thereunder.

Appellants Strang and Howard contend that there is insufficient evidence to support the jury's verdicts of guilty.[8] An appellate court's function in reviewing the verdict of a jury is very limited. We do not sit as a trier of fact and will not enter into a de novo consideration of the evidence. The verdict of the jury cannot be reversed if there is substantial evidence to support the findings of guilt. *Glasser* v. *United States*, 315 U.S. 60; *United States*

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7. In a general information letter dated June 1, 1963, the VA stated:

> "The V.A. has re-examined its position and has determined, as a matter of administrative policy, that the interest of the Government and of lenders and veterans will be best served by requiring supervised lenders to discontinue the closing of loans on the automatic basis in those instances where such closing would be for the accommodation of a non-supervised lender, i.e., closing under the automatic procedure will have the effect of enabling the non-supervised lender to do indirectly what it may not do directly."

8. Levinson does not argue the sufficiency of the evidence.

v. *Knight,* 336 U.S. 505. In considering the sufficiency of the evidence, we do not determine whether it establishes guilt beyond a reasonable doubt, but only that the evidence would permit the triers of facts to find the defendants guilty beyond a reasonable doubt. *Ramsey* v. *United States,* 248 F.2d 740 (C.A. 6); *United States* v. *Ragland,* 306 F.2d 732 (C.A. 4) cert. den. 371 U.S. 949. In considering the sufficiency of the evidence in a criminal case, we must construe the evidence most favorably to the government. *Glasser* v. *United States, supra.* This includes the drawing of all reasonable inferences and reasonable credibility determinations favorable to the government. *Glasser* v. *United States, supra; United States* v. *Decker,* 304 F.2d 702 (C.A. 6). To do otherwise would usurp the prerogatives of the jury.

The following quotation from the Court's opinion in *United States* v. *Luxenberg, supra,* at pp. 249-250, concerning knowledge of and participation in a criminal conspiracy is relevant to the questions raised by appellants herein on the sufficiency of the evidence:

> "Knowledge, like intent, is a factual issue which may be proved by circumstantial evidence. Whether a conspiracy exists is likewise a factual question . . . It is not fatal to the prosecution's case that it does not prove that the defendants knew or participated in every phase of the unlawful scheme. (Citations omitted.) It is only necessary that a defendant know of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance. (Citations omitted.) Participation in a conspiracy need not be proved by direct evidence. '(A) common purpose and plan may be inferred from a development and collocation of circumstances.' (Citations omitted.) It is not necessary that there be a formal agreement in order to have an unlawful conspiracy.

(Citations omitted.) 'Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose.'" (Citations omitted.)

Applying those principles to the evidence that was before the jury, we conclude that there was sufficient evidence to support the jury's verdicts of guilty against Howard and Strang. Howard was the one who introduced Levinson to Strang, and made the initial contact with Wayne. He was present at the initial meeting between Levinson and Strang. According to Dorothy Stuart's testimony, Howard directed her to sign the names of the veterans applying for loans and of Strang. Howard accompanied Nancy Murray to Koppin's house where Koppin signed a check dated January 4, 1963, under misleading representations. Howard eventually signed the buy-back agreement requested by Bayer. Further, Howard accompanied Tunesi to the VA offices where he introduced himself as "Mr. Ross" to avoid making known his relation to Franklin. There is further evidence that Howard visited at least one veteran who had not yet occupied the home involved and threatened him with criminal prosecution if he did not move in.[9] He also arranged for certain mortgages to be kept current by bringing checks to the veterans for their endorsement, which checks were then recorded by Franklin as mortgage payments.[10] This evidence, together with all the other evidence presented to the jury, is sufficient to support the guilty verdict entered against Howard.

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9. The VA regulations require that a veteran occupy the home on which a guaranty is sought.

10. By keeping the payments up to date, appellants were trying to prevent the government from contending that the loans were bad.

If the evidence relative to Strang merely supported a finding of imprudent business practices or acumen, the jury would not have been warranted in returning a verdict of guilty against him. However, this was not the case. Strang signed the agreement with Franklin on December 20, 1962, and thereafter attempted to secure the approval of Wayne's general counsel without informing him that he had already executed it. A letter dated December 21, 1963, and signed by Strang, gave Franklin permission to close 22 loans at a time when no one at either Franklin or Wayne had made a proper credit check. Furthermore, 22 loans were closed before the end of the year, prior to securing Bayer's approval of the arrangement. Cerwin testified that Strang said that he was going through the motions of approving the loans. Strang personally signed some of the reports sent to the VA which stated that the loans met the requirements of the statute and regulations, when in fact they did not and when Strang hardly examined the files. Strang arranged for the partial disbursement of funds by check, dated January 4, 1963, by misleading Koppin as to the purpose for which the funds were required. Strang supplied Franklin with Wayne stationery and told Dorothy Stuart to contact his secretary when she needed more. Strang told Howard to conceal his connection with Franklin when Howard accompanied Tunesi to the VA's offices. Strang personally, and a corporation of which Strang was a major stockholder, profited on the extra point Rem Realty agreed to pay. This evidence taken in conjunction with the other evidence before the jury is sufficient to support its finding of Strang's guilt.

Appellants Levinson, Franklin and Strang contend that the trial judge committed reversible error in permitting the government, over objection, to elicit testi-

monial evidence concerning transactions involving the FHA. The evidence concerned the false and fraudulent obtaining of FHA mortgage insurance on two loans previously rejected by the VA which were the subject of counts 26 to 33 of the indictment. These counts were severed from the trial in the instant case. However other aspects of these two loans involving veterans Reese and Spates, were the subject of several substantive counts of the indictment which were submitted to the jury.

Strang contends that the evidence was inadmissible because it concerned matters and dealings with which he had no connection and because the acts were committed subsequent to the termination of the conspiracy with which he was allegedly connected. Strang relies on the well settled principle of law that the declarations of a co-conspirator made after the termination of the conspiracy and not in furtherance thereof are admissible only against the declarant and not against the other alleged conspirators. See, *Krulewitch* v. *United States,* 336 U.S. 440. While *Krulewitch* may apply to declarations of conspirators, the case does not govern evidence of acts of co-conspirators committed subsequent to the termination of the alleged conspiracy which are admissible if relevant to prove the conspiracy and which demonstrate its existence and illegal purposes. *Lutwak* v. *United States,* 344 U.S. 604, rehearing den. 345 U.S. 919. Cerwin's testimony was relevant to prove the aims of the conspirators and the manner in which similar frauds were perpetrated and as such were admissible against all appellants.

Appellants Levinson and Franklin argue that the admission of such testimony was contrary to the trial judge's original order severing counts 26 through 33 from the trial herein and was extremely prejudicial to their positions.

The mere granting of a severance does not thereafter preclude a trial judge from admitting evidence relating to crimes which are the subject of the severed counts of an indictment if such evidence satisfies the applicable rules of relevancy to the issues of the case on trial. As indicated above such evidence was clearly admissible.

We hold that the trial judge did not abuse his discretion and thereby commit error in permitting Cerwin to testify concerning the securing of FHA mortgage insurance on the Reese and Spates loans.

During the course of the trial, over the objection of Franklin's and Levinson's counsel, F.B.I. Agent Bolton testified to the substance of an oral statement made to him by their co-defendant Strang and the government introduced into evidence the unsigned copy of the statement itself. Prior to Bolton's testimony and the receipt of the statement into evidence, the judge cautioned the jury that both the written and oral statements were admissible against Strang only and could not be considered against any of the other co-defendants. Appellants Franklin and Levinson contend that the trial judge committed reversible error in not sustaining their objections to such evidence. Strang's statements were not confessions of guilt. Levinson and Franklin characterize them as exculpatory as to Strang and extremely inculpatory as to themselves. Levinson and Franklin object to those portions of Strang's statements which indicate that Levinson and Franklin agreed to assume full responsibility for examining and approving mortgages as far as credit was concerned, on behalf of Wayne and that Levinson, Howard and Cerwin had forged his signature on letters and documents submitted to the Veterans Administration.

In support of their position, appellants Franklin and Levinson, rely primarily on the recent Supreme Court de-

cision in *Bruton* v. *United States*, 391 U.S. 123. *Bruton*, in overruling *Delli Paoli* v. *United States*, 352 U.S. 232, held that a defendant's right to cross-examination may be violated by the introduction into evidence, in a joint trial, of a co-defendant's incriminating extra-judicial statements. In the circumstances, of that case, the Supreme Court held that cautionary instructions by the judge to the jury could not eliminate the substantial prejudice to the petitioner. In *Roberts* v. *Russell*, 392 U.S. 293, the Supreme Court held that the *Bruton* rule was retroactive. But *Bruton* clearly recognized that "(n)ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Bruton* v. *United States*, *supra*. Cautionary instructions are impotent to overcome those situations in which there is great risk that the jury will not or cannot abide by the judge's instructions to the detriment of the defendant's vital interests. The Supreme Court characterized the statement of *Bruton's* co-defendant as "powerfully incriminating."

Strang, like *Bruton's* co-defendant, did not take the stand. Contrary to Franklin's and Levinson's assertions it cannot be said that the allegedly inculpatory portions of Strang's oral and written statements had a devastating effect on the minds of the jurors. Franklin and Levinson argue that Strang's extra-judicial statements regarding Levinson's and Franklin's alleged assumption of complete responsibility for checking credit "was unequivocally the most damaging information reaching the jury box concerning the appellants Levinson and Franklin Mortgage." However the case may be, the record is re-

plete with other evidence and testimony to the same effect. Cerwin testified that at a meeting attended by Levinson, Strang and himself, Levinson agreed on behalf of Franklin to assume the responsibility in regards to making an analysis of the credit. The testimony of Dorothy Stuart, a secretary and clerk at Franklin, further indicates that Franklin closed loans without first submitting the papers to Wayne for processing. Medinis testified that when Levinson called him he told him that all Medinis' applications for mortgages would be approved "regardless of anything." Cerwin corroborated this testimony and further testified that after both he and Medinis commented on the poor quality of the applications, Levinson ordered Cerwin "to go ahead and process them anyway." Other evidence and testimony further supports the view that Franklin and Levinson knew that a good number of applications were from extremely poor credit risks and that Wayne would not and could not make a credit check, but relied upon the office of Franklin to perform the check.

Levinson argues that Strang's statements to the effect that he "did not authorize Levinson, Howard, Cerwin or anyone else to sign my signature" implied that Levinson was guilty of such wrongdoing. In view of the other evidence presented at the trial, little weight must be given to this argument. Dorothy Stuart testified that she signed Strang's name to various documents at the insistence of Cerwin and Howard. Furthermore, because of the fact that Strang's signature was required on various documents sent directly by Franklin to the Veterans Administration, it must be assumed that someone at Franklin had directed the signing of Strang's name on the documents.

In view of the fact that Strang's statements added little, if anything, to a record replete with similar and corroborative evidence, it cannot be said that the cautionary instructions accompanying the admission into evidence of Strang's oral and written statements was insufficient to eliminate any possible prejudice to Franklin and Levinson. Furthermore, we conclude that the admission of such statements, even if it be considered error, was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, rehearing den. 386 U.S. 987.

Contrary to appellants Levinson's and Franklin's contentions we hold that it was proper for the trial judge to permit testimony concerning the practices of prudent lenders in the Michigan area. Such testimony was relevant because it provided the background information concerning the transactions with the VA, explained the procedures used in the Detroit VA office and established the effect or materiality of the allegedly false statements contained in the documents submitted to the VA.

Strang contends that the trial judge committed error in failing to instruct the jury as he requested with respect to the conspiracy count. The government presented its case on the basis of a single conspiracy which had as its purpose the defrauding of the United States and the violation of Section 1001, Title 18, U.S.C. Strang's theory was that there was not one over-all conspiracy, but that there were actually two separate and distinct conspiracies, one, to avoid the statutory and regulatory requirement that the supervised lender exercise its independent judgment as to the qualifications of the loan, and the other to submit false statements concerning the loan applications to the VA. Strang contended that even if he

was a member of the first conspiracy, he was not and could not be connected with the second. In accordance with this position, Strang requested the trial judge to charge the jury that if Strang was a member of only one prong of the conspiracy and not a member of the overall conspiracy, Strang should be acquitted on Count one of the indictment. The trial judge agreed with the government's contention that this was a single conspiracy aimed at thwarting the lawful operation of the VA home loan guaranty program. The government submitted the case on this basis, the court instructed the jury on this basis, and there was more than sufficient evidence to support the jury's implicit finding of a single conspiracy. The trial judge believed that no evidence was presented which warranted an instruction of a multiple conspiracy charge as requested by Strang. He stated:

> "I think I indicated I saw no evidence of any secondary agreement. There is one conspiracy here or there isn't any. At least that is my conclusion from the testimony."

We have carefully reviewed the entire record in this case and hold that the trial judge was correct in denying Strang's request for a multiple conspiracy charge.

We find no merit to Strang's claim that the trial judge did not properly instruct the jury on the defense of advise of counsel. It is questionable that he was entitled to any instruction on that defense. Admittedly Strang did not fully advise his counsel as to all of the circumstances of the transaction and he signed the agreement on December 20th before he consulted his lawyer. It was not the contract itself which was illegal but the conduct under it, of which counsel was not fully advised, that constituted the conspiracy. On December 21, 1962, prior to obtaining any

approval of Wayne's General Counsel, Strang signed a letter authorizing Franklin to close 22 loans.

Appellants Strang, Levinson and Franklin contend that reversible error resulted from the trial judge's refusal, in his charge, to read, explain and interpret pertinent regulations of the VA concerning the home loan guaranty program. The pertinent regulations were read to the jury numerous times during the course of the trial. Defense counsel referred to them extensively during opening statements and closing arguments. Kelly of the VA was on the witness stand for nine days during which time he was examined and was examined extensively on the meaning of the regulations. The "Lenders Manual," published by the VA, was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to and quoted several parts of the VA's regulations and manual in his charge to the jury. The meaning and substance of the regulations were adequately before the jury and the trial judge did not err in denying Strang's, Levinson's and Franklin's requested instructions concerning the interpretation and meaning of the regulations. No claim is made, and none can be made, that the trial judge improperly instructed the jury on the elements necessary to find appellants guilty of conspiracy and the various substantive offenses charged.

Judgment affirmed.

APPENDIX B

Judgment and Commitment (Re: Ross Howard)

(Filed June 21, 1967)

On this 19th day of June, 1967, came the attorney for the government and the defendant appeared in person and by counsel, Abel J. Selburn.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of conspiracy; false statements to obtain VA loans; aiding and abetting; in violation of Sections 371, 1001 and 2, Title 18, U.S.C., as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months, under the provisions of Section 4208(a)(2), Title 18, U.S.C.

IT IS ADJUDGED that the defendant pay to the Clerk of the Court for the use and benefit of the United States a fine in the amount of Ten thousand ($10,000.00) dollars.

The defendant's appearance bond is hereby cancelled.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Thomas P. Thornton
United States District Judge

APPENDIX C

Motion for New Trial

(Filed July 15, 1966)

Defendant, Ross C. Howard, moves the Court to grant him a new trial for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The Court erred in denying Defendant's Motion for Judgment of Acquittal made at the conclusion of the Government's case and renewed at the conclusion of all of the evidence.

3. The verdict is contrary to the great weight of evidence.

4. The verdict is not supported by substantial evidence.

5. The jury ignored the defendant's basic presumption of innocence, and the Government's burden of proving the Defendant's guilt beyond a reasonable doubt.

6. The Court erred in permitting prejudicial testimony to be presented in this cause regarding the severed part of the indictment wholly irrelevant to Defendant, Ross C. Howard, in which severed part the Court had previously stated its position, to wit: that Counts 26 to 33 of said Indictment relating to a conspiracy to defraud the Federal Housing Administration should be severed from the Indictment because of its prejudicial nature and because of its irrelevancy to the cause of the Defendant Ross C. Howard. The Court, however, at the time of trial permitted testimony in regard to Counts 26 through 33

and said testimony was highly prejudicial to Defendant, Ross C. Howard, and should have been excluded.

7. That the Court erred in submitting the entire Indictment to the jury for its deliberation, which instrument, and particularly Count 1 had many charges unsupported by any evidence.

8. The Court erred in submitting the entire Indictment, including the substantive Counts to the jury which had not been specified or identified by the Government during the trial and to which a jury could only guess as being directly involved in the proofs referred to by the Government.

9. The Court erred in giving to the jury during its deliberations statements of all defendants which had been made to the F.B.I. without renewing its instructions that such statements were binding only on the maker thereof.

10. The Court erred in providing complete transcripts of testimony of certain witnesses to the jury which resulted in undue emphasis of their testimony without benefit of other testimony which may have contradicted, explained or disproved the testimony on the particular point which the jury was then considering which was of course unknown to Defendant and further allowing the review of such entire testimony without specific reference therefor and without Court supervision and in effect granted a re-trial of Defendant, Ross C. Howard on a limited submission of proofs and testimony without the protection of Defendant's counsel or the right to resubmit or re-emphasize evidence favorable to Defendant or explanatory and contradictory to the testimony of those witnesses reviewed.

11. That the Court erred in not construing the statutes, rules and regulations and law for the jury in its

instructions, but instead ieft said construction to the speculation of the jury.

12. That the Court erred in charging the jury and in refusing to charge the jury as requested.

/s/ Abel J. Selburn
Abel J. Selburn
Attorney for Defendant
2215 Cadillac Tower
Detroit, Michigan 48226

Dated: July 15, 1966

APPENDIX D

Order Denying Motion in Arrest of Judgment, Motion for New Trial, and Motion to Canvass the Jury by Defendant Ross C. Howard

At a session of said Court held in the Federal Building, Detroit, Michigan, on May 17, 1967.

PRESENT: Honorable Thomas P. Thornton
United States District Judge

The Motion In Arrest of Judgment is denied for the reasons set forth in the Order Denying the Motion to Arrest Judgment made by Benjamin Levinson and Franklin Mortgage Corporation, reference to which is herewith made.

The Motion to Canvass the Jury by the defendant Ross C. Howard is denied for the reasons set forth in the order denying the motion of Edward P. Strang, Jr. to canvass the jury, reference to which is herewith made.

The Motion for New Trial of the defendant Ross C. Howard is substantially the same as the Motion for New Trial submitted by the defendants Benjamin Levinson

and Franklin Mortgage Corporation, with the exception of paragraph 10 of Howard's motion which reads as follows:

> "The Court erred in providing complete transcripts of testimony of certain witnesses to the jury which resulted in undue emphasis of their testimony without benefit of other testimony which may have contradicted, explained or disproved the testimony on the particular point which the jury was then considering which was of course unknown to Defendant and further allowing the review of such entire testimony without specific reference therefor and without Court supervision and in effect granted a re-trial of Defendant, Ross C. Howard on a limited submission of proofs and testimony without the protection of Defendant's counsel or the right to resubmit or reemphasize evidence favorable to Defendant or explanatory and contradictory to the testimony of those witnesses reviewed."

In conjunction with the furnishing of complete transcripts of testimony of certain witnesses to the jury as alleged in the foregoing paragraph 10, the following discussion was had between the Court and counsel: (Pages 5044-45, Transcript)

> "(Transcripts were thereupon handed to counsel.)
>
> MR. LOUISELL: Well, I don't know how to go about this.
>
> THE COURT: Well, some of them—some of the parts that have been withdrawn is testimony of other witnesses; and then there is discussion between the Court and counsel out of the presence of the jury.
>
> MR. LOUISELL: Well, for my part, I am satisfied with the judgment that the Court has exercised in the matter.
>
> THE COURT: Well, Mr. Buckley and I both went over it.

MR. SHELY: I am likewise satisfied.

MR. MORGANROTH: So are we, your Honor.

MR. SELBURN: So are we.

MR. MORRIS: So are we, your Honor.

THE COURT: Does anyone else have any objections to the procedure that we are adopting here?

(No response.)

THE COURT: The Government?

MR. MORRIS: The Government has none, your Honor.

THE COURT: All right. Mr. Buckley, suppose you take out what is stapled together there. If anyone has any objection to these going into the jury, why, now is the time to raise it.

(No response.)

THE COURT: Does anyone want to be heard in relation to the transcripts?

(No response.)

THE COURT: All right, will you give those to Tom.

(Transcripts containing the testimony of witnesses Dorothy Stuart and Robert Cerwin, after there being deleted therefrom the testimony of other witnesses and discussions between the Court and counsel out of the presence of the jury, were thereupon given to the Court Crier for delivery to the jury.)"

Mr. Selburn was the attorney for defendant Howard during the entire course of the trial. He voiced no objection to the manner in which the transcripts were prepared by the Court Reporter and furnished by the Court to the jury. He remained silent when the Court inquired if anyone, including Mr. Selburn, had any objections to the furnishing of the transcripts to the jury during its deliberations. If any party or any attorney representing

any party had any objections, that was the opportunity provided by the Court to raise them. There being no response from counsel for the government or counsel for defendants, including Mr. Selburn, to the Court inquiry, as indicated by the foregoing colloquy between the Court and counsel, the transcripts were furnished to the jury.

In the light of the foregoing there is no merit to the allegations in paragraph 10 of Howard's Motion for New Trial.

All of the other allegations in Howard's Motion for New Trial are denied for the reasons set forth in the Order Denying Motion for New Trial of the defendants Benjamin Levinson and Franklin Mortgage Corporation.

/s/ Thomas P. Thornton
Thomas P. Thornton
United States District Judge

APPENDIX E

Order Denying Motion for New Trial (Re: Deft. Levinson)

At a session of said Court held in the Federal Building, Detroit, Michigan, on May 17, 1967.

PRESENT: Honorable Thomas P. Thornton
United States District Judge

Defendant Benjamin Levinson has filed a motion for new trial. The grounds for said motion are set forth in eight allegations which we will proceed to discuss seriatim.

Allegation 1

"Count I of the indictment failed to charge an offense known to law."

In determining prior motions this Court has ruled that the Indictment is sufficient in charging offenses as defined by statutes of the United States.

Allegation 2

> "The Court erred in charging the jury and in refusing to charge the jury as requested."

A rather extended conference was had by counsel and the Court regarding the charge of the Court and the Requests to Charge submitted by the respective counsel. In the judgment of the Court the charge given to the jury in this matter was free from error and was adequate.

Allegation 3

> "The Court erred in permitting testimony as to transactions relating to severed portions of the indictment, to the substantial prejudice of this defendant."

The recollection of the Court is that testimony was adduced at the trial concerning certain alleged fraudulent transactions that had their origin in the conspiracy alleged in the Indictment (Count I) and that the testimony carried over into transactions that were covered by certain of the counts that were in the severed part of the Indictment. It is the further recollection of the Court that this testimony was adduced by counsel for Levinson in his cross-examination of the government witness Cerwin. This testimony was admitted by the Court as showing transactions (in which the conspirators participated) which took place after the termination of the conspiracy, as bearing on the intent and purpose of the conspiracy, and on the acts of the conspirators during the existence of the conspiracy.

Allegations 4 and 5

> "The Court erred in allowing the jury to determine as an issue of fact the construction to be given to the

language of the pertinent statute and the language of the pertinent regulations adopted pursuant to the applicable statute."

"The Court erred in allowing the jury to determine as an issue of fact whether or not the transaction described in the testimony occurring between the Franklin Mortgage Corporation and the Wayne National Life Insurance Company was lawful and within the contemplation of the pertinent statutes and the then existing rules and regulations enacted pursuant to such statutes."

The Indictment upon which the defendants were tried in this cause alleges violations of Sections 371, 1001 and 2, Title 18, U.S.C. (Conspiracy; False Statements to Obtain Veterans Administration Loans; Aiding and Abetting). The substantive counts in the Indictment allege violations of Section 1010, Title 18 U.S.C. (False Statements to Obtain Federal Housing Administration Loans). In relation to these particular statutes the Court, in its judgment, charged the jury concerning the application of the said statutes to the evidence presented at the trial of this cause and to the counts in the Indictment.

The conspiracy count in the Indictment (Count I) alleges in part as follows:

"That on or about December 15, 1962, and continuing to on or about January 13, 1964, in the Eastern District of Michigan, Southern Division,

BENJAMIN LEVINSON
FRANKLIN MORTGAGE CORPORATION, a Michigan Corporation
EDWARD P. STRANG, JR.
RICHARD DAVID MITCHELL
RICHARD E. MEDINIS
ROSS HOWARD
REM REALTY COMPANY, a Michigan Corporation
THOMAS WHITFORD

defendants herein, and Robert Cerwin, co-conspirator but not defendant, did in violation of Title 18, U.S.C., Section 371, unlawfully, wilfully, knowingly and feloniously conspire between and among themselves, and with others to the Grand Jury unknown, to commit offenses against the United States of America, to wit: to defraud the United States of America, in particular the Veterans Administration, an agency of the United States of America, of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder, and to violate Section 1001, Title 18, United States Code."

"It was a part of said conspiracy that the defendants would represent that Wayne National Life Insurance Company processed loans to veterans (authorized pursuant to Section 1802(d), Title 38, United States Code) and submitted these loans to the Veterans Administration for automatic guaranty, when in fact the aforesaid loans were, as intended by the defendants, processed by the FRANKLIN MORTGAGE CORPORATION (not authorized pursuant to Section 1802(d) Title 38, United States Code to take such action) as the intended mortgagee."

"It was a further part of said conspiracy that the defendants would submit, and cause to be submitted, the following loan documents and reports, among others, to the Veterans Administration in connection with the foregoing loans:

(a) Veterans Administration Report of Home Loan Processed on Automatic Basis—VA Form 26-1820

(b) Mortgage Closing Statements

(c) Request for Modification of Procedure in Respect to Postponement of Off-Site or Exterior On-Site Improvements. VA Form VB-4-1847

(d) Escrow Agreement for Postponed Exterior On-Site Improvements. VA Form 26-1849

(e) Letters of Submission to the Veterans Administration

(f) Wayne National Life Insurance Company Loan Applications

which loan documents and reports contained false and fraudulent statements as to the assets of the veteran borrower, his debts, credit rating, escrow payments, down payment on the purchase price and employment record, and which loan documents and reports wilfully concealed the material fact that the FRANKLIN MORTGAGE CORPORATION was the actual lender for whom the guaranty was being obtained."

The government produced as a witness an officer of the Michigan office of the Veterans Administration who, as the Court recollects, identified himself as the official who is in charge of the loan guaranty program in the Detroit office of the Veterans Administration. It is the further recollection of the Court that this official gave testimony on direct and cross-examination for a period of seven or eight days explaining the proper procedures under the Veterans Administration's loan guaranty program, under the provisions of the rules and regulations of the Veterans Administration and under the different sections of Title 38, U.S.C. that regulated the operation of the loan guaranty program by the Veterans Administration.

As part of the charge of the Court the jury was instructed as follows:

"The Administrator of Veterans' Affairs is the head of the Veterans Administration

He has authority to make all rules and regulations which are necessary or appropriate to carry out the

laws administered by the Veterans Administration and are consistent therewith.

The Administrator may assign duties, and delegate authority to act and to render decisions, with respect to all laws administered by the Veterans Administration, to such officers and employees as he may find necessary.

Within the limitations of such delegations or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Administrator."

Since the defendants named in the conspiracy count (Count I) are charged in part as follows:

"* * * to defraud the United States of America, in particular the Veterans Administration, an agency of the United States of America, of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder, * * *"

and since the charge must be pertinent to the matters charged in the Indictment and developed by the testimony presented by both the government and the defendants, this Court, in its judgment, feels that the charge to the jury given by the Court was proper in all respects.

Allegation 6

"The Court erred in its rulings on the admissibility of evidence to the substantial prejudice of this defendant."

Since this is a "catch-all" allegation without identification as to any particular ruling, the determination of the Court will be just as general with the statement that none of the rulings of the Court in relation to the admissibility of evidence were made with the intent to prejudice either the prosecution or the defense.

Allegation 7

"The Court erred in denying the defendants' request that the jury be interrogated as to whether they had received, seen or read certain campaign literature widely circulated on behalf of the assistant United States Attorney in charge of the prosecution of the cause in support of his candidacy for the office of judge of the Recorder's Court for the City of Detroit."

My recollection of this incident is as follows: Mr. Louisell, one of the attorneys for Benjamin Levinson and Franklin Mortgage Corporation, asked the Court for a conference out of the presence of the jury. This request was granted with a query by the Court as to whether or not a court reporter would be necessary. The Court was advised that the presence of a court reporter would not be required. The conference was held in chambers, at which time Mr. Louisell produced a document, which is defendant's Exhibit 205 and which was admitted under the express provision that it would not be made available to the jury in the event the jury requested all of the exhibits. Mr. Louisell advised the Court that he had knowledge of this piece of literature; that he sent his son, a young lawyer, to a building or an office being used as a campaign headquarters to obtain a copy of this particular document and, as the Court recalls, that was the extent of the statement in relation to this document. That ended the conference. The exhibit has some handwriting at the top of one side that is not supported by any sworn evidence or affidavits. In fact, there is no legal evidence of anything that would warrant the Court in interrogating the jury as to this piece of campaign literature.

Allegation 8

"The Court erred in restricting to 5 in number the character witnesses this defendant wished to call to testify."

Michelson v. *United States*, 335 U.S. 469, 480 (1948) reads as follows:

> "In the frontier phase of our law's development, calling friends to vouch for defendant's good character, and its counterpart—calling the rivals and enemies of a witness to impeach him by testifying that his reputation for veracity was so bad that he was unworthy of belief on his oath—were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle. Growth of urban conditions, where one may never know or hear the name of his next-door neighbor, have tended to limit the use of these techniques and to deprive them of weight with juries. The popularity of both procedures has subsided, but courts of last resort have sought to overcome danger that the true issues will be obscured and confused by investing the trial court with discretion to limit the number of such witnesses and to control cross-examination. Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject."

The Motion for New Trial is denied.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 26 1969
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court No. 1089

Court of Appeals Nos. 18206 and 18207

BENJAMIN LEVINSON and
FRANKLIN MORTGAGE CORPORATION,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court No. .....

Court of Appeals Nos. 18206 and 18207

BENJAMIN LEVINSON and
FRANKLIN MORTGAGE CORPORATION,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, by their attorneys, Joseph W. Louisell and Ivan E. Barris, pray that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, entered December 30, 1968 and judgment in accordance with that Opinion, hereinafter set forth, (Appendix A, *infra*, pp. 31-63 *et seq.*) is not yet officially reported.

2. JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered on December 30, 1968; with an extension of time to February 28, 1969, granted by this Court within which to file this petition for certiorari. The jurisdiction of the Court is invoked under Title 28 U.S.C. §1254(1).

3. QUESTIONS PRESENTED

The questions presented by this petition are:

A. Whether the placing in evidence as a part of the government's case of an unsigned statement taken by an FBI Agent from one of petitioners' co-defendants and alleged principal co-conspirators who did not himself testify, by means of detailed testimony of the Agent as to all that was told him by this co-defendant and alleged co-conspirator, followed by a placing of the unsigned statement itself in evidence through identification by the Agent, which statement, in substantial part an attempt to place on petitioners, particularly Levinson, all the onus as the purported instigators and perpetrators of the wrong charged by the government, was highly incriminatory as to petitions, can properly be held:

(1) to have been eliminated as of "any possible prejudice" to petitioners by the Trial Court's cautionary instructions to the jury disavowed as effective by this Court's decision in *Bruton v. United States,* 391 U.S. 123 (1968), overruling *Delli Paoli v. United States,* 352 U.S. 232 (1957), and

(2) to have been "harmless" error "beyond a reasonable doubt", as required by this Court's decision in *Chapman v. California*, 386 U.S. 18 (1967),

because of what was termed by the Court of Appeals for the Sixth Circuit other "similar and corroborative evidence" with which it said the record herein was replete.

B. Whether, contrary to the decision of the United States Court of Appeals for the Sixth Circuit in affirming the judgments herein, reversible error resulted from the Trial Court's refusal to instruct the jury as to the meaning and legal interpretation of the allegedly applicable rules and regulations of the Veterans Administration, admitted by all to have the force and effect of law, despite specific requests by counsel for petitioners for such instructions, the Trial Court saying that it was for the jury to "make their own interpretations" of the same.

4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions involved herein are set forth in Appendix B, *infra*, pp. 64-66.

Sixth Amendment to the Federal Constitution:

18 U.S.C. §371;

18 U.S.C. §1001;

18 U.S.C. §1002;

18 U.S.C. §4208(a)(2);

38 U.S.C. §1801;

38 U.S.C. §1802(d)(1).

5. STATEMENT OF THE CASE

On November 9, 1965 the Federal Grand Jury, Eastern District of Michigan, Southern Division, returned a 33-count Indictment charging two corporations and six individuals with violations of federal law which are hereinafter set forth. Included among the defendants were petitioners Benjamin Levinson and Franklin Mortgage Corporation, a Michigan corporation, whose president is Benjamin Levinson. The petitioners were charged as defendants in Counts 1 through 17, inclusive, and in Counts 26 through 33, inclusive, neither being named in Counts 18 through 25, inclusive. Prior to trial, on motion of a co-defendant, the Trial Court ordered a separate trial as to Counts 26 through 33, inclusive. Trial of the cause commenced on April 26, 1966. On July 9, 1966 the jury returned verdicts of guilty on all Counts against petitioners Levinson and Franklin Mortgage Corporation.

The twenty-five Counts of the Indictment which the trial itself dealt with involved the dealings of the various defendants with the Veterans Administration (sometimes hereinafter referred to as V.A.).

Count I of the Indictment is two-pronged: First, it charges all eight of the defendants against whom charges were made in the Indictment, and also Robert Cerwin as a co-conspirator but not a defendant, with conspiring (unlawfully, etc.) to defraud the United States, in particular the Veterans Administration, an agency thereof, "of its right to have its loan guaranty program administered in accordance with the provisions of §1801, *et seq.*, Title 38 United States Code, and the rules and regulations promulgated thereunder." The "Section 1801, *et seq.*," to which Count 1 makes reference, are those portions of the Federal law providing government benefits for qualifying

veterans by way of guaranteeing, up to a prescribed limit, payment of loans made to them for certain home, farm and business purposes, including loans for the purchase or construction by the veteran of a dwelling to be owned and occupied by him as a home.

Secondly, all these defendants were further charged, in Count 1, with conspiring "to violate Section 1001, Title 18, United States Code", which section, generally, makes punishable, as therein provided, knowingly and wilfully falsifying, concealing or covering up by trick, scheme, or device a material fact, or making any false, ficticious or fraudulent statements or representations, or making or using any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of the United States.

Counts 2 through 25 alleged substantive violations of 18 U.S.C. §§1001 and 2, each of such counts being predicated upon allegedly false statements in a designated V.A. form:

> submitted to the Veterans Administration by defendant Franklin Mortgage Corporation in connection with an application [by a named veteran] for the purpose of securing credit for a loan. . . . to be guaranteed by the Veterans Administration. . . .

Each of the substantive counts charged that the defendants named therein knowingly submitted to the V.A. documents containing various false statements. Each count dealt with a separate V.A. document and stated in what respects it allegedly had been falsified.

During the course of the trial it was the theory of the Government that some twenty-two veterans' mortgage loan applications were the subject of an alleged agreement

among the defendants to handle these in such a manner as to deprive the V.A. of its right to have its loan guarantee program administered in accordance with what the Government contends to be the requirements of the Federal Statutes and of the V.A. rules and regulations in that

(A) There would be no valid exercise of judgment on the part of a supervised lender that a particular veteran and a particular mortgage loan application qualified for a Government guarantee, and

(B) That mortgage loan applications which (the Government claims) all the defendants knew did not qualify for a Government guarantee[1] would be submitted.

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[1] A "nonsupervised" lender was required to submit to the V.A. prior to the disbursement of the loan, all documents concerning the proposed loan so that the V.A. could check the documents, evaluate the loan according to the appropriate standards and determine whether it would guarantee the loan. This method of obtaining a V.A. guarantee was known as the "prior approval" method. An "unsupervised" lender could obtain a V.A. guarantee only on such a "prior approval" basis.

The V.A. had, however, an automatic loan guaranty program. Under this program, "supervised" lenders (so-called because they were institutions supervised by federal or state agencies) were entrusted with the responsibility of determining whether a proposed loan met V.A. standards. 38 U.S.C. §1802(d)(1). If the supervised lender determined that those standards had been met, it was authorized to close and disburse the loan and then submit it to the V.A., which would automatically guarantee it.

For these purposes, Wayne, as an insurance company subject to supervision by the Michigan Insurance Commissioner, was a "supervised lender", capable of participating in the V.A. loan guarantee program on the "automatic" basis. Franklin, however, was a "nonsupervised lender", and could obtain a V.A. Guarantee for a proposed loan solely on the "prior approval" basis.

Co-defendant Strang was the president of the Wayne National Life Insurance Company.

The Government attempted to prove an agreement between petitioner Franklin Mortgage Corporation and Wayne National Life Insurance Company to be a guise so that they would be able to obtain V.A. mortgages without submitting them on a prior approval basis. The government's theory was that the transaction was illegal because the non-supervised lender, Franklin Mortgage Corporation, assumed the responsibility of checking the credit on the mortgage applicants hence "there would be no valid exercise of judgment on the part of a supervised lender that a particular mortgage loan application qualified for a Government guarantee". Thus, the central issue in the lawsuit was whether or not Franklin Mortgage Corporation and Benjamin Levinson had assumed the responsibility of checking the applicants' credit.

In order to prove its contention, the Government, during its case in chief, called F.B.I. Agent William Lee Bolton. Over the objection by counsel for petitioners the United States Attorney was permitted to inquire of the special agent as to the contents of an unsigned statement given to said agent by co-defendant and alleged co-conspirator Edward P. Strang, Jr., after the termination of the alleged conspiracy. *Strang himself did not testify at the trial.*

The statement was the product of an interview conducted by agent Bolton in Strang's office on July 13, 1964. It was the agent's testimony that Strang had told him at that time that he (Strang) had been contacted in December, 1962 by Ross Howard, who was acting as a representative of petitioner Levinson. Strang indicated to Bolton that the purpose of the contact was to explain to Strang the fact that Wayne National Life Insurance Company could process mortgages on an automatic basis and that the Veterans Administration would insure such mortgages without any prior submission of the mortgage documents to the Veterans Administration.

The special agent further testified that Howard introduced Strang to petitioner Levinson, who also explained the process whereby Wayne National Life Insurance Company could submit mortgages without prior approval. Strang's statement indicated that appellant Levison told him that if Strang's company would cooperate, that appellant Franklin Mortgage Company would repurchase the mortgages at a one (1) point discount in favor of Wayne National.

Strang was further said to have told the agent that the agreement was eventually consummated between himself and appellant Levinson although he did have contact with Ross Howard, Robert Cerwin and Donald Layher, all employees of Franklin Mortgage.

The particular portions of Strang's statements that were to have a devastating effect on Levinson and Franklin Mortgage related to certain contentions made by Strang to Agent Bolton that petitioner Levinson agreed that he and/or Franklin would assume full responsibility for examining and approving mortgages as far as credit was concerned, on behalf of Wayne National. These portions of Strang's statements may best be elucidated by various direct quotations from the transcript of testimony in this cause. Agent Bolton testified that:

> "Mr. Strang advised that in his discussions with Levinson it was agreed and Levinson accept(ed) the responsibility for Franklin to review and process the mortgages as to credit acceptability and proper documentation."
>
> "He advised that Wayne National was not set up to process mortgages and no one connected with Wayne National had the ability to analyze this type of mortgage as to credit acceptability or documentation.

"He advised that he had been in the mortgage business for several years, however, his business dealings concerned commercial or industrial mortgages and not residential mortgages. He stated Mr. Levinson was apprised of this and that Levinson accepted responsibility of examining and approving the mortgages, credit-wise, in behalf of Wayne National."

"Mr. Strang emphasized the Wayne National was advised by Mr. Levinson of its authority to process VA mortgages on the automatic basis, that Wayne National was not in the mortgage business, was not equipped, prepared to handle the processing or examining the credit acceptability of home loan mortgages. Mr. Levinson was told this by him, and he was also told that Wayne National did not want to keep the mortgages as an investment and that Mr. Levinson assured him that they had an investor who would buy the loans.

"Mr. Levinson promised him that his company would analyze the credit of the veteran to make certain that the requests were in order.

"Mr. Strang stated that he was not concerned with the credit of the veterans because this was being handled by Levinson and because Levinson was to repurchase the mortgages."

"Mr. Strang restated the fact that he relied on Mr. Levinson to make certain that the loans were acceptable from a credit point of view, that he did not enter into the agreement with any thought, intent, indication or knowledge that Franklin was processing loans with the hope they would go into foreclosure."

During cross-examination of Agent Bolton *by counsel for Strang,* the unsigned, written statement itself was admitted into evidence over appellants' objections and was thereafter read into the record. (Emphasis supplied.)

Subsequently, out of the presence of the jury, counsel for petitioners made a motion to strike Bolton's testimony regarding Strang's statement. Among other things, counsel objected to the fact that the statement was completely exculpatory as to the declarant, while highly incriminatory with respect to appellants Levinson and Franklin Mortgage Company. Counsel argued that the statement was objectionable as hearsay and admissible against neither appellant Levinson nor Franklin.

The Government contended that the statement did have some probative value as to Strang's guilt. Paradoxically, *Strang's own counsel insisted that the statement stay in, finding himself "wholly in agreement" with Government counsel.* The motion to strike the testimony was denied. (Emphasis supplied.)

Petitioner Levinson took the witness stand in his own behalf, subjecting himself to cross-examination by Strang's counsel, and categorically denied he had assumed any responsibility as to checking credit.[2]

During the course of the colloquy between the Court and counsel concerning proposed and requested charges to the jury, counsel for defendants Levinson and Franklin Mortgage Company spoke of the difficulty he was having with Count 1, the Count charging a conspiracy to deprive the Government of its right to administer the V.A. program in accordance with the statutes and regulations, with the Court then answering, in part:

> The Court: "I can't approach that as being an involved thing, because Kelly was here, and he was

[2] It should be clearly understood that defendant Strang, whose extra-judicial statement was put in evidence, by not taking the witness stand in his own behalf did not subject himself to cross-examination by petitioners' counsel.

> on the stand for a little over eight or nine days, and in the course of his testimony, he described his functions and the application of the different regulations, and I would have to be very careful in my charge if I invade the province of the jury—and I recognize it as purely a factual question." * * *

Mr. Kelly, the Veterans Administration Loan Guaranty Officer, was indeed permitted on several occasions to testify as to his interpretation of the federal statute and the V.A. regulations deemed applicable herein. To this testimony strenuous objection was made by counsel for the defendants, including counsel for defendants Levinson and Franklin Mortgage Company. The objections were argued at some length and on one occasion in the absence of a jury.

In further discussions concerning the requested charges to the jury, the Court stated:

> The Court: * * *
>
> "I am going to read Title 38, the Section that is suggested, as I would the Section 371 of Title 18, the conspiracy; and Section 1001, the false claim, because you are required to read those.
>
> "But since the regulations, in my opinion, have been discussed; have been read into evidence and have been examined by the Government, and cross-examined by the defendants, if they all are in the Lenders Manual, it is in evidence. The jury has a right to take that manual with it into the jury room.
>
> "I will authorize the jury to make notations of the sections that are in discussion, and let them read the sections *and make their own interpretations,* because that is where I am very conscious of the fact that since this is the meat of the first section of the conspiracy count, if I get into the field of advising on these things, why, I am very conscious of the fact that it could be construed as an invasion of the function of the jury. So I am not going to be caught in it." (Emphasis supplied.)

Then, a bit later, during the same discussion, the following exchange took place:

> Mr. Louisell (counsel for defendants Levinson and Franklin Mortgage Company): "It is my position that the regulations of the Veterans Administration with which we are here concerned were enacted pursuant to statute and that they have the force and effect of statute.
>
> The Court: "No doubt about that.
>
> Mr. Louisell: "And it is my position that it is the obligation of the Court to construe and interpret the statutes and regulations, * * * (Citations).
>
> * * * * *
>
> Mr. Louisell: * * *
>
> "Now, I very strongly feel that it is wrong for the Court to hand the jury the task of interpreting and construing the statutes, and regulations which have the effect of statutes. I have said this before and I say it again, that I think that this is a function that is peculiarly reserved to the Court, and that, as difficult as it may be, it is your function. And to hand the layman the function of interpreting what those rules and regulations mean—which, for all purposes with which we are here concerned, constitute a statute—I think is wrong.
>
> * * * * *
>
> The Court: "I have already indicated that that is all in the testimony of Mr. Kelly, the statutes, and how they are used, and that is the same answer I gave you before, I think."

In the course of these discussions concerning the request to charge made by the various counsel, the Court made its ruling which included a declination to give any instruction as to the meaning of the V.A. rules and regulations despite specific requests by counsel so to do.

Subsequent to the jury verdict, a motion for arrest of judgment, of acquittal and for a new trial was made on behalf of defendants-appellants Levinson and Franklin

Mortgage Corporation, together with supplemental motions for a new trial for each, which motions were heard and denied. On June 19, 1967, the judgments of the Trial Court were entered, committing defendant Benjamin Levinson to the custody of the Attorney General for eighteen (18) months under the provisions of Title 18, U.S.C., §4208(a)(2) and to pay a fine of Ten Thousand ($10,000.00) Dollars and for defendant Franklin Mortgage Corporation to pay a fine of Ten Thousand ($10,000.00) Dollars.

Notices of Appeal were filed as to defendants-appellants Levinson and Franklin Mortgage Corporation on June 19, 1967. Petitioners' convictions were affirmed by the United States Court of Appeals, Sixth Circuit, on December 30, 1968.

6. REASONS FOR GRANTING THE WRIT

It is respectfully submitted that, in affirming the judgment of the District Court herein (entered pursuant to a verdict of guilty by the jury), committing and fining petitioner Benjamin Levinson and fining petitioner Franklin Mortgage Corporation, in spite of the receiving in evidence at the trial, over the objections of counsel for the petitioners, of the testimony of F.B.I. Agent Bolton placing before the jury at length and in every detail an out-of-court statement made to the agent on the latter's solicitation by co-defendant and alleged co-conspirator Edward P. Strang, Jr., exculpatory as to the declarant and highly incriminatory as to petitioners Levinson and Franklin Mortgage Corporation, followed by the admitting into evidence of the unsigned statement[3] itself, the Court of Appeals for

[3] This statement was prepared by Agent Bolton and typed in his office after an interview he had with Strang. Agent Bolton testified that Strang said he would sign it, however it never was signed by Strang. Nevertheless, it was received in evidence, over objection by counsel for petitioners, through Agent Bolton, as Strang's statement.

the Sixth Circuit decided this federal question, important in the conduct of this trial, in a way in direct conflict with this Court's applicable decision in *Bruton v. United States,* 391 U.S. 123 (1968). As in *Bruton,* the declarant, Strang, did not testify at the trial, hence could not be subjected to cross-examination by petitioners' counsel concerning any of the purported facts related in his statement that were quite prejudicial to petitioners.

It is further respectfully submitted that the attempted justification by the Court of Appeals for its decision herein, to the effect that, in view of what it termed "similar" and "corroborative" evidence, "it cannot be said that the cautionary instructions accompanying the admission into evidence of Strang's oral and written statements was insufficient to eliminate any possible prejudice to Franklin and Levinson", emphasizes the direct conflict of the decision of the Court of Appeals herein with the decision of this Court in *Bruton.* Still further, that the added statement of the Court of Appeals that: "Furthermore, we conclude that the admission of such statements, even if it be considered error, was harmless beyond a reasonable doubt", not only is refuted by the facts, and underscores the conflict of the Court of Appeals with this Court's decision, but also places the Sixth Circuit in conflict with decisions of certain other courts of appeal in applying this Court's decision in *Chapman v. California,* 386 U.S. 18 (1967).

As yet another reason for granting the Writ here sought, this Court's attention is respectfully directed to the refusal of the District Court to instruct the jury on the legal interpretations of the rules and regulations of the Veterans Administration, acknowledged by all, including the Trial Court, to have the force and effect of law. In affirming the judgment of the District Court notwithstanding this

breach by it of the well-grounded principle that a defendant in a criminal prosecution has the absolute right to an exact and correct statement of the law from the Court, it is respectfully submitted that the Court of Appeals for the Sixth Circuit decided a further federal question herein in a way in conflict with applicable decisions of this Court, including that in *Bird v. United States,* 180 U.S. 356 (1901).

A. The Court of Appeals' Decision Herein Conflicts With this Court's Decision in Bruton.

By the Sixth Amendment to the Constitution of the United States, the accused in all criminal prosecutions is guaranteed, among other things, the right "to be confronted with the witnesses against him."

In concluding the majority opinion in *Bruton v. United States, supra,* Mr. Justice Brennan stated:

> "* * * Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instructions at all. (citations)"

In allowing co-defendant and alleged co-conspirator Strang's statement to be presented to the jury, on the trial in the instant case, the Trial Court was, in effect, permitting Strang to testify. The statement was introduced initially by the Government, through F.B.I. Agent Bolton, upon the ground, as stated, that it served to connect, in some way, Strang with the alleged unlawful conspiracy. However, if so, it went far beyond this. As

illustrated, in part, by the hereinbefore quoted excerpts from the statement, Strang was endeavoring to throw all the onus for what happened on to petitioner Levinson. It was so exculpatory of himself that Strang's attorney finally offered the unsigned statement itself, as prepared by Agent Bolton, into evidence. Strang repeatedly stated therein, in various ways, *as a fact,* that petitioner Levinson agreed that his organization, Franklin Mortgage Corporation, would analyze the credit of the veterans; that Strang's corporation, Wayne National Life Insurance Company, would be relieved of this responsibility. All of this, as the Court of Appeals agreed, was denied by petitioner Levinson, both directly when he testified in his own behalf, and by certain of the other testimony.

However, co-defendant Strang who accomplished what was tantamount to testifying at the trial through his statement, and whose testimony thus procured was most damaging to petitioners Levinson and Franklin Mortgage Corporation, *could not be cross-examined as to his accusations against petitioners because he did not take the witness stand.* Accordingly, petitioners clearly were denied their constitutional right to be confronted with what amounted to a very important witness against them.

The question as to who was to assume the burden of analyzing the credit of the veterans seeking the mortgage loans was no side issue. In its opinion herein, the Court of Appeals for the Sixth Circuit said (App., p. 40):

> "* * * It was the arrangement between Wayne [National Life Insurance Company] and Franklin [Mortgage Corporation], which we will hereinafter discuss, that gave rise to the conspiracy and other charges herein involved. * * *"

Later, in further commenting on the evidence relating thereto, and recognizing Strang's contribution to it, the Court of Appeals said (App., p. 48):

> "Cerwin testified that it was agreed between Wayne and Franklin that Wayne's sole task was to supply the money and obtain the VA guaranty in its name, and that Franklin would attend to all the details, including the credit check. *Strang's statement which he made to the FBI is to the same effect.* Levinson disagreed with this characterization of the arrangement and testified that it was his understanding that Wayne would perform the credit analyses as did the other supervised lenders with whom Franklin had accommodation arrangements." [Emphasis supplied.]

For the Court of Appeals to conclude that the statement of co-defendant, and alleged co-conspirator Strang, a major actor in the occurrence being presented to the jury on the trial of the instant case, which, as the Court of Appeals recognized, materially assisted Cerwin, also charged as a co-conspirator (but not as a defendant for obvious reasons) in pointing to petitioner Levinson, and through him Franklin Mortgage Corporation, as the perpetrators of the wrong charged by the government[4] "was harmless [to these petitioners] beyond a reasonable doubt" just has to be characterized as incredible. It defies logic and runs counter to the lessons taught by trial experience. With due respect to the Court of Appeals, it is respectfully submitted that it appears to be justification for its decision rather than a reasoning toward that end.

In holding the admission into evidence of the contents of Strang's extrajudicial statement as harmless beyond a reasonable doubt, the Court of Appeals is not only in conflict with this Court's decision in *Bruton,* but also other

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[4] Cerwin's testimony, as an alleged co-conspirator with petitioners, Levinson and Franklin, and with Strang and the others, itself is subject to careful scrutiny, and its value needs to be weighed in view of the circumstances, including relieving Cerwin from prosecution for his testimony.

decisions of this Court. In *Anderson v. Nelson,* 390 U.S. 523 (1968), a habeas corpus proceeding, the District Court granted the relief sought. The Court of Appeals for the Ninth Circuit reversed the District Court, pointing out as support for its reversal that the improper comments at the trial on the defendant's failure to testify was harmless error because there was direct testimony as to commission by the defendant of the offense charged, and observing that the jury could have acquitted the defendant only by rejecting substantially all of the prosecution's testimony and bringing in a verdict in the teeth of the evidence.[5] This Court reversed the Court of Appeals, holding that the error could not be considered harmless.

As Mr. Justice Frankfurter said in his dissenting opinion in *Delli Paoli v. United States,* 352 U.S. 232, 248 (1957), which decision was overruled by this Court in *Bruton:*

> "It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best of reasons for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him. In any event, it is not for an appellate tribunal to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against petitioner."

There can be no valid contention that, by application of this Court's decision in *Bruton,* the admission into evidence of the contents of the Strang statement on the trial herein, both through a sentence by sentence recitation thereof by F.B.I. Agent Bolton and by receiving into evidence the unsigned statement as prepared by the Agent,

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[5] See: *Wilson v. Anderson,* 379 F. 2d 330 (C.A. 9, 1967).

was other than improper. True, it is said by this Court in *Bruton* that not every admission of inadmissible hearsay or other evidence can be considered to be reversible error; that instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. These, it is respectfully submitted, involve relatively innocuous evidence, and is certainly not the situation in the instant case. The Strang extrajudicial statement did not creep into evidence inadvertently. It was deliberately spread before jury for the purpose of proving guilt. The trial court considered it powerful enough to call for a limiting instruction. In *Bruton,* this Court has now determined that, in most instances where extrajudicial statements of a defendant which incriminate a co-defendant are involved, a context is presented in which the risk that the jury will not, or cannot, follow the instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. The following words of this Court in *Bruton* describing such a context are equally descriptive of the situation in the instant case:

> "* * * Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devasting to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed."

In excusings its avoidance of the reversal of the judgment in the instant case dictated by *Bruton,* by holding that "it cannot be said that the cautionary instructions accompanying the admission into evidence of Strang's oral and written statements was insufficient to eliminate any possible prejudice to Franklin and Levinson", the Court of Appeals for the Sixth Circuit was, in effect, improperly closing its mind to the truth as spoken by Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States,* 336 U.S. 440, 453 (1949), and repeated by this Court in *Bruton:* " 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .' "

B. A Violation of the Rule Enunciated in Bruton Can Never Be Deemed Harmless Error.

The Court of Appeals, citing *Chapman v. United States, supra,* held that if there was error in the instant case it was harmless beyond a reasonable doubt. Petitioner urges that where a defendant in a criminal trial suffers the impact of a violation of the *Bruton* rule, thus obliterating his 6th Amendment right to confront and cross-examine the witness against him, the violation can never be deemed harmless beyond a reasonable doubt.

The U. S. Supreme Court in the *Chapman* case did say that there may be some constitutional errors which in the setting of a particular case, are so innocuous that they may be deemed harmless; however, the court is careful to note that there are some "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error * * *." In support of this statement, this Honorable Court cited in *Chapman,* in footnote 8, *Payne*

v. Arkansas, 356 U.S. 560, involving a coerced confession; *Gideon v. Wainwright,* 372 U.S. 335, involving the right to counsel; and *Tumey v. Ohio,* 273 U.S. 510, involving the impartiality of a judge. It is important to note that these cases have all been held to be completely retroactive. *Linkletter v. Walker,* 381 U.S. 618; *Johnson v. New Jersey,* 384 U.S. 719.

This Honorable Court, in *Roberts v. Russell,* 392 U.S. 293, held *Bruton, supra,* to be retroactive. In so doing, it is respectfully urged that the court held *sub silentio* that when a confession or statement of a co-defendant which implicates the other is introduced in evidence, and the declarant does not take the witness stand and subject himself to cross-examination, the harmless error rule is inapplicable.

This contention is buttressed by the language of the *Bruton* decision itself. The court in the *Bruton* decision relied quite heavily on *Jackson v. Denno,* 378 U.S. 368. In *Jackson,* this court said:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond,* 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction."

The Maryland Court of Special Appeals in *Smithson v. Maryland,* 247 A2d 542, seems to agree with petitioner's contention without so holding.

C. The Court of Appeals' Decision Herein Conflicts With Certain Decisions of Other Courts of Appeal.

The resort herein by the Court of Appeals for the Sixth Circuit, as justification for its decision, to the expression of a conclusion that the admission in evidence of the Strang statement, "even if it be considered error, was harmless beyond a reasonable doubt", was, as stated, dictated by this Court's decision in *Chapman v. California,* 386 U.S. 18 (1967), wherein it was held that, before an error involving the denial of a federal consitutional right can be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Obviously, at least as strict a test is imposed where a federal criminal case is before the reviewing court.

Where such a subjective test is the matter under consideration, influenced by the always, at least to some degree, varied facts of the various cases, it is, of course, most difficult to make exact comparisons of the manner in which different United States Courts of Appeal have interpreted and applied the federal rule established, or perhaps refined, by this Court in *Chapman.* However, it is respectfully submitted that, upon analysis of opinions of certain of these Courts of Appeal, it can be said that the conception by these courts of what this Court, by its decision in *Chapman,* requires of them differs from that which, by its decision in the instant case, the Court of Appeals for the Sixth Circuit appears to conceive to be required of it.

In *United States ex rel. Johnson v. Yeager,* 399 F. 2d 508 (1968), the Court of Appeals for the Third Circuit was concerned with the materiality of the improperly admitted co-defendants' confession during the joint trial

on even a portion of the decision the jury was required to make. Finding such to be material was considered by the Court of Appeals for the Third Circuit enough to cause it to be unable to say that the limiting instructions of the trial judge made the constitutional error harmless beyond a reasonable doubt. It is respectfully urged that nothing could be more material to the jury's determination of the guilt or innocence of petitioners in the instant case than the improperly admitted direct accusation levied against them by a co-defendant and alleged co-conspirator of the wrong-doing as charged by the government.

The Court of Appeals for the Third Circuit, in *Government of Virgin Islands v. Bell,* 392 F. 2d 207 (1968), while agreeing with the government that the evidence introduced at the trial to convict the defendant-appellant was adequate to support the jury's verdict, refused, for such reason, to rule as harmless the District Court's improper authorization to the jury to consider the inferences from the defendant's failure to testify even though the District Court tempered the thrust of the improper instruction by adding that the government still had the burden of proving each element and that the failure to testify itself did not warrant an inference of guilt.

In *Pearson v. United States,* 389 F. 2d 684 (1968), the Court of Appeals for the Fifth Circuit was concerned with the relevancy of the proposed cross-examination of a witness improperly denied the defendant-appellant. Finding it would be relevant was held by it sufficient to rule that the error was harmful and that the appellant was entitled to a new trial. The contention therein of the prosecution that the evidence of the appellant's guilt was overwhelming hence the error, assuming it to be error, was thus rendered harmless was rather summarily dismissed as a valid test, contrary to the decision of the Court of Appeals for the Sixth Circuit in the instant case.

In each of these decisions, the Court of Appeals was interpreting and applying this Court's decisions in *Chapman v. California, supra.*

Significantly, the Court of Appeals for the Sixth Circuit itself has, it is respectfully submitted, evidenced by various of its decisions and opinions an approach in its consideration of the harmless error rule not in accord with that taken by it in the instant case.

In *United States v. Vida,* 370 F. 2d 759, 764 (1966), the Court of Appeals for the Sixth Circuit, even prior to this Court's decisions in *Chapman* and in *Bruton,* said:

> "• • • With increasing emphasis, we are cautioned that the patent guilt of an accused is wholly immaterial to an appellate court's consideration of the adequacy of a trial court's protection of his constitutional rights. • • •"

And, in *Rosenthall v. Henderson,* 389 F. 2d 514, 516 (1968), it said:

> "• • • The test is not whether there was sufficient evidence to convict without that which is challenged; the test is whether the evidence complained of might have contributed to the conviction;"

with *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963), and *Chapman v. California, supra,* cited.

The justification resorted to by the Court of Appeals for the Sixth Circuit for its avoidance herein of the mandate provided it by this Court's decision in *Bruton v. United States, supra,* sounds foreign to its above quoted words. It respectfully urged that, had it here heeded the caution it voiced in *Vida* and had it applied in the instant case the test it approved and applied in *Rosenthall,* the result on the appeal to it herein would just have had to have been different than it was.

D. The Court of Appeals' Decision Herein Also Conflicts With This Court's Decision as to a Trial Court's Duties in Instructing the Jury on the Law Involved.

In its failure to reverse the judgment of the District Court because of the latter's refusal to instruct the jury as to the legal interpretation of the Veterans Administration rules and regulations applicable herein, it is respectfully contended that the Court of Appeals for the Sixth Circuit again decided a federal question in a way in conflict with applicable decisions of this Court, or certainly so far sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power of supervision.

It was acknowledged by all, as previously stated, that the VA rules and regulations had and have the force and effect of law. In fact, Count 1 of the indictment herein charges the defendants, including petitioners, with conspiring to defraud the United States, in particular the Veterans Administration, of its right to have its loan guaranty program administered in accordance with the cited United States Code provisions "and the rules and regulations promulgated thereunder." Subsequent counts likewise make reference to the conduct therein related as being in violation of the rules and regulations as well as cited code sections.

In the landmark case of *Bird v. United States,* 180 U.S. 356 (1901), this Court said:

> "It is well settled that the defendant has a right to a full statement of the law from the Court and that neglect to give such a statement, when the jury consequently fall into error, is sufficient reason for reversal.

> "The numerous decisions to that effect are cited in *Wharton on Criminal Law,* Volume 3, Section 3162, 7th Ed. The chief object contemplated in the charge of the Judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular evidence involved."

Instead of according the defendants herein (including petitioners) the full statement of the law to which they were entitled, which law necessarily included that provided by the applicable rules and regulations, the Trial Court said it was of the opinion that it was for the jury herein to "make their own interpretations" of what was required by the regulations the defendants were charged with violating.

The Trial Court based its refusal to explain and interpret the pertinent VA regulations on the ground that the principal witness for the prosecution had described at length, during his protracted examination, "the application of the different regulations"; that they had been discussed, and referred to in examination and cross-examination; and that they were all in the VA Lenders' Manual which was in evidence and which the jury had a right to take with it into the jury room. In its affirming of the judgments herein, and expressly in its opinion, the Court of Appeals, in this instant case, sanctioned this serious and radical departure by the Trial Court from what is normally to be expected of it in the conduct of a trial; sanctioned this abdication by the Trial Court of its duty as the source or fountain of the law, so-to-speak, to the grave detriment of the defendants, including the petitioners herein.

This extensive examination of the principal prosecution witness, both on direct and on cross-examination, as to *his*

interpretation of the allegedly pertinent VA regulations having the force of law, instead of excusing an explanation and interpretation thereof by the Trial Court made it more necessary to have such. It just does not square with the constitutional and procedural safeguards zealously accorded a defendant in a criminal case to insure for him a fair trial to have any of the applicable law, that it is to follow, provided the jury by a protagonist, particularly the leading accuser. A "discussion", if that it can be called, of applicable law by the parties and their attorneys during the course of the trial certainly seems much more likely to confuse the jury rather than to clarify the jury's understanding of this applicable law, requiring the Trial Court to put it in proper perspective and place by a proper charge as to it.

To say that making the Lenders' Manual, in which the regulations are contained and commented on *by one of the parties,* by the accuser, any substitute for a proper charge on this law by the Trial Court seems as lacking in propriety as to say that any charge by the Trial Court concerning the conspiracy charge could also have been avoided properly by providing the jury for its own use during its deliberations with a copy of the volume or volumes of the United States Code, particularly annotated volumes, treating of conspiracy as a crime. The jurors were not experts in interpreting these VA regulations, nor had they ever dealt with them before. If they had been such experts they would not have been accepted as jurors.

Quite pertinent here is *United States v. Pincourt,* 159 F. 2d 917 (C.A. 3, 1947). The *Pincourt* decision involved a prosecution for conspiracy to sell distilled spirits above the O.P.A. established selling prices. The indictment formally charged that *Pincourt* and six others did wilfully conspire to sell and deliver certain distilled spirits at prices

which were to be in excess of maximum prices authorized by law and the provisions of Maximum Price Regulation 445, Article 3, issued pursuant to the Emergency Price Control Act of 1942, as amended. The pertinent issue as framed by the Appellate Court was whether "the jury was sufficiently instructed by the Court to enable it to perform its duty."

In *Pincourt,* the alleged criminal activity on the part of the appellant was, as indicated, based on his alleged violation of Regulation 445, as amended. The Trial Court there, as here, failed to instruct as to the meaning and interpretation of that regulation. Circuit Court Judge McLaughlin, writing for an unanimous court, stated at page 919 as follows:

> "The relevant portion of that regulation, namely amendment 9, was the primary law of the case. Instructions from the court regarding it were necessary in order for the jury to intelligently apply it as part of the controlling law to the facts and so reach a verdict based upon a proper understanding of the issues."

In reversing the conviction the Court went on to state:

> "Amendment 9 of Regulation 445 was not explained, read or mentioned by the District Judge in his charge. Without the governing regulation being made plain to it, the jury could not have an informed judgment on the issue and the case did not go to it under the safeguard of correct procedure."

The *Pincourt* decision alluded to *United States v. Noble,* 155 F. 2d 315 (C.A. 3, 1946). The *Noble* case involved a prosecution for a violation of the Second War Powers Act of 1942, 50 U.S.C. Appendix, Section 631, *et seq.* and of general ration orders promulgated thereunder. The Trial Court there, as here, likewise failed to instruct as

to the ration orders allegedly violated. The indictment there, as here, did go to the jury. In reversing, the Court of Appeals for the Third Circuit held, at page 316:

> "We think it is self-evident that a jury cannot perform its duty to determine guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it is equally self-evident that the only appropriate source of this knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law."

In both the *Pincourt* and *Noble* cases it should be noted that trial counsel did not object to the charge, which was not the situation herein. Despite the lack of such objection, the Court of Appeals for the Third Circuit determined the error so fundamental that it required reversal.

In a nutshell, petitioners state that they had a right to have the Court instruct the jury as to the law of the case. Patently the Court refused to do so even in the face of a specific request, a refusal or failure which petitioners respectfully urge constitutes reversible error.

7. CONCLUSION

For the reasons aforementioned, petitioners do pray that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

Nos. 18204, 18205, 18206, 18207

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

January Term, 1969

The United States of America, *Plaintiff-Appellee,* v. Benjamin Levinson, Franklin Mortgage Corporation, Edward P. Strang, Jr., Ross Howard, *Defendants-Appellants.*	On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

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Decided December 30, 1968.

Before: Phillips and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. Edward P. Strang, Jr., Ross Howard, Franklin Mortgage Corporation and Benjamin Levinson, defendants-appellants herein, appeal from judgment of conviction in the United States District Court for the Eastern District of Michigan. The essence of the offense of which the appellants were convicted, as charged in the first count of the indictment, was a conspiracy to defraud the United States through the Veterans Administra-

tion, an agency of the United States, by preventing the Veterans Administration from having its loan guaranty program administered in accordance with the provisions of Section 1801 et seq., Title 18, U.S.C. and the rules and regulations promulgated thereunder. Although the indictment contained 33 counts, the trial judge severed counts 26 through 33 from the instant trial. The substantive offenses charged in counts 2 through 25 of the indictment stem from the alleged conspiracy in the first count.

In addition to the appellants herein, Richard David Mitchell, Richard E. Medinis, Thomas Whitford and Rem Realty Company, a Michigan corporation, were also indicted in the first count of the indictment. Robert Cerwin, an employee of Franklin Mortgage Corporation, was named as a co-conspirator but was not indicted. Rem Realty Company became defunct as a corporation and was dismissed before trial. Richard E. Medinis pleaded guilty and Thomas Whitford was dismissed at the close of the government's case. Richard David Mitchell was convicted but is now deceased.

Counts 2 to 5, 8 to 10 and 12 to 15 charged Levinson, Franklin, Strang, Mitchell, Medinis, Rem Realty and Howard with specific violations of Section 1001,[1] Title 18, U.S.C. Counts 6, 7, 16 and 17 charged Levinson, Franklin and Howard with specific violations of Section 1001. Count 11 charged Levinson, Franklin and Strang with violation of Section 1001. Counts 18 and 19 charged Medinis, Mit-

[1] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

chell, Rem Realty and Whitford with specific violations of Section 1001. Counts 20 to 25 charged Mitchell, Medinis and Rem Realty with violations of Section 1001. The severed counts of the indictment, Nos. 26 through 33, involve similar conspiracy and substantive offenses relative to the loan program of the Federal Housing Administration (FHA).

The case was tried before a jury and all of the defendants, except Whitford, Rem Realty and Medinis, were convicted on all of the counts of the indictment. The trial judge sentenced Franklin to pay a $10,000 fine, and sentenced Levinson, Strang and Howard each to pay a $10,000 fine and to 18 months' imprisonment upon their pleas "of not guilty and verdict(s) of guilty of the offense of conspiracy; false statements to obtain VA loans; aiding and abetting; in violation of Sections 371, 1001 and 2, Title 18, U.S.C., as charged in the indictment; . . ."

The Veterans Administration's home loan plan program is based upon Section 1801 et seq., Title 38, U.S.C., and the regulations promulgated thereunder. The statutory plans provide for the issuance by the VA of guaranties on mortgage loans made to veterans. To participate in this program a veteran must have been discharged under other than dishonorable conditions and have served a minimum of ninety days' service. Sectioon 1810(b) states that no loan may be guaranteed unless

> "(1) the proceeds of such loan will be used to pay for the property purchased, constructed, or improved;
>
> "(2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses;

"(3) the veteran is a satisfactory credit risk;

"(4) the nature and condition of the property is such as to be suitable for dwelling purposes;

"(5) the price paid or to be paid by the veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof as determined by the Administrator; and

"(6) if the loan is for repair, alteration or improvement of property, such repair, alteration, or improvement substantially protects or improves the basic livability or utility of such property."

Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Section 1802(d) provides for the issuance of automatic guaranties on loans made by "supervised lenders." A "supervised lender" is generally any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Wayne National Life Insurance Company qualified as a "supervised lender" because it was an insurance company subject to the supervision of the Michigan Insurance Commissioner. It is the responsibility of the supervised lender to determine whether the loan meets the requirements of the statute and regulations. Section 1032, Veterans Administration Regulations.

Unlike supervised lenders, whose loans are automatically guaranteed by the VA, "non-supervised lenders" must seek guaranties on the "prior approval basis." A "non-supervised lender" is one that is not subject to the supervision of a federal or state agency. Franklin Mortgage Corporation was a non-supervised lender. Under the "prior approval basis" of obtaining guaranties, the VA, not the

lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. The VA would make this determination on the basis of the pertinent information required to be submitted to it by the lender. If the loan is held to qualify the VA so notifies the lender who then closes the loan and submits the loan to the VA who issues its guaranty.

The benefits of obtaining guaranties on the automatic basis are twofold. It relieves the VA of the necessity of making a detailed and lengthy study of the loan application to see if it qualifies for a guaranty. This responsibility is assumed by the supervised lender who certifies that "the loan conforms otherwise with the applicable provisions of 38 U.S.C., Chapter 37, and of the regulations concerning guaranty of insurance of loans to veterans." Because the VA does not make the determination of eligibility, the guaranties are issued much sooner than if the application had been submitted on a prior approval basis.

Appellants Strang and Howard contend that the conspiracy count of the indictment, Count one, is defective and insufficient and should have been quashed. Both of these appellants made pre-trial motions to this effect which were denied by the trial judge. The decisions of the Supreme Court make it clear that a valid indictment must fulfill two distinct functions. First, an indictment must inform the accused of the nature of the charges against him, with such specificity and particularity that the accused is enabled to undertake and prepare an adequate defense. Second, an indictment must be so framed that it should be evident to what extent a plea of double jeopardy is available to the accused in the event of future charges involving similar offenses. *United States v. Debrow*, 346 U.S. 374; *Hagner v. United States*, 285 U.S. 427; *Russell v. United States*, 369 U.S. 749.

Although an indictment is subject to careful examination to assure conformity with the strict requirements mentioned above, not all lapses from precision and correctness require that an indictment be quashed. Non-prejudicial errors and defects do not invalidate indictments which otherwise fulfill the two prime requisites of informing the accused of the nature of the charge and defining the scope of a future plea of double jeopardy. *Smith v. United States,* 360 U.S. 1; *Williams v. United States,* 341 U.S. 97. The essence of this principle is found in Rule 52(a) of the Federal Rules of Criminal Procedure which states that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Rule 7(c) of the F.R.Crim.P. provides that "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In addition to stating the specific statutory violation alleged, the indictment must indicate the manner in which the alleged violation occurred and the essential factual allegations in support thereof. An indictment which does not mislead the accused as to the nature of the offense charged, enables him to prepare an adequate defense and is specific enough to prevent future prosecutions for the same offense, is valid in spite of any minor deficiencies or technical errors.

Count one of the indictment charged the defendants with a violation of Section 371, Title 18, U.S.C., the general conspiracy section. Section 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This section provides criminal sanctions for two distinct types of conspiratorial action. The first, involving a conspiracy to "commit any offense" against the United States, concerns conspiracies having as their object the commission of unlawful acts subject to criminal prosecution or suit for penalty. *United States v. Hutto*, 256 U.S. 524. The second prong of the general conspiracy section, involving a conspiracy "to defraud the United States," includes conspiracies having as their purpose impairing, obstructing or defeating the lawful function of any department of government. *Haas v. Henkel*, 216 U.S. 462.

Count one of the present indictment charges that the defendants

> ". . . did in violation of Title 18, U.S.C. Section 371, unlawfully, wilfully, knowingly and feloniously conspire between and among themselves, and with others to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to defraud the United States of America, in particular the Veterans Administration, an agency of the United States of America, of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38 United States Code, and the rules and regulations promulgated thereunder, and to violate Section 1001, Title 18, United States Code."

This indictment is admittedly artlessly framed by charging defendants with a conspiracy to commit the offense of defrauding the United States by failing to adhere to the provisions of Section 1801 et seq. Section 1801 et seq. does not create a substantitve criminal offense or provide a penalty for failure to follow its prescriptions. Thus if the indictment is read literally under the "offense" portion of

Section 371 a conspiracy to commit an "offense" is not properly alleged. But such a literal reading of the indictment does damage to the plain and obvious meaning it was intended to impart. It is obvious that what was meant to be charged was a conspiracy to defraud the United States. The words "to commit offenses against the United States of America, to-wit:" are, in regard to this portion of the indictment, mere surplusage and can be ignored. *United States v. Vazquez,* 319 F.2d 381 (C.A. 3), cert. den. 385 U.S. 846. "The insertion of surplus words in the indictment does not change the nature of the offense charged." *Bridges v. United States,* 346 U.S. 209, 223. See also, *Bary v. United States,* 292 F.2d 53 (C.A. 10); *United States v. Chunn,* 347 F.2d 717 (C.A. 4). These words, which are surplusage with respect to the "defraud" portion of the indictment, more properly belong with the part of the indictment which charges defendants with conspiring to "violate Section 1001, Title 18, United States Code." Count one of the indictment makes it evident and clear that the defendants are charged with a conspiracy to defraud the United States and to commit offenses against the United States in violation of Section 1001, Title 18, U.S.C. There can be no misunderstanding of the nature of the charges and consequently no resulting prejudice to the defendants.

Appellants further argue that the portion of Count one charging a conspiracy to violate Section 1001, Title 18, U.S.C. is insufficient because it merely cites the substantive crime which was the object of the alleged conspiracy. If all that Count one of the indictment contained was a simple allegation that defendants conspired to violate a particular provision of the criminal code, appellants' position would be correct. However paragraph four of Count one states that

> "It was a further part of said conspiracy that the defendants would submit and cause to be submitted, the following loan documents and reports, among others, to the Veterans Administration . . . which loan documents contained false and fraudulent statements. . . ."

This paragraph defines that portion of the conspiracy dealing with the violation of Section 1001.

Appellants challenge the sufficiency of paragraph four arguing that it merely alleges what was done instead of what was agreed to be done. However paragraph four specifically alleges that as part of the conspiracy the defendants "would submit, and cause to be submitted," false and fraudulent documents.

The statement in the indictment that the defendants conspired to defraud the United States "of its right to have its loan guaranty program administered in accordance with the provisions of Section 1801, et seq., Title 38, United States Code, and the rules and regulations promulgated thereunder" is a clear and definite statement of the governmental function which the defendants allegedly conspired to obstruct and impair. We hold that the indictment is not vague or ambiguous and thus satisfies the requirements of the Sixth Amendment.

The following statement by the Supreme Court in *United States v. Debrow, supra,* at 377-378, is relevant to the alleged insufficiency and invalidity of the present indictment:

> "The charges of the indictment followed substantially the wording of the statute which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused so as to enable them to prepare their defense

and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7(f), F.R. Crim. Proc."

We hold that the indictment is sufficient and does not violate the Fifth or Sixth Amendments to the Constitution.

It is claimed on behalf of Strang that his constitutional rights were violated by denying him the right to counsel in the grand jury room during his interrogation; that government counsel failed to advise him of his right to counsel before testifying and to have counsel present outside the grand jury room for purposes of consultation; and that he was subpoenaed and questioned without giving notice to his counsel. It is argued that because of these violations the indictment should be dismissed as to Strang either because of the alleged constitutional violations or by reason of the Court's supervisory power over federal law enforcement. The question was raised by a motion before trial to dismiss the indictment. The motion was denied.

The appellant, Edward P. Strang, Jr., was president of Wayne National Life Insurance Company. It was the arrangement between Wayne and Franklin, which we will hereinafter discuss, that gave rise to the conspiracy and other charges herein involved. Strang while under investigation of the charges for which he was later indicted was called to testify before the grand jury concerning the case about which he was being investigated.

It appears from the record before us that Strang had a conversation with Mr. Barton W. Morris, assistant United States Attorney, before entering the grand jury room and was advised that anything he said could be used against him and that he did not have to testify to anything that might incriminate him. The same admonition was given to him in the grand jury room after he was sworn. In his conversation with Mr. Morris, Strang asked if he could have his lawyer with him in the grand jury room and was told that he could not. Before entering the grand jury room Strang knew what the investigation was about and of the possible involvement of himself and Wayne. For sometime prior to his appearance before the grand jury he had consulted with five lawyers and there is evidence that he knew for two days that a subpoena had been issued for him to testify before the grand jury. Before entering the grand jury room Strang requested and received permission to make a telephone call.

It has been recognized that a potential defendant may be subpoenaed to testify before a grand jury. *United States v. Clearly,* 265 F.2d 459 (C.A. 2), cert. den. 360 U.S. 936; *United States v. Winter,* 348 F.2d 204 (C.A. 2), cert. den. 382 U.S. 955. See also, *United States v. Luxenberg,* 374 F.2d 241 (C.A. 6). Rule 6(d) F.R.Crim.P. provides:

> "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

It has never been held except in *Sheridan v. Garrison,* 273 F.Supp. 673 (E.D.La), that a witness, whether a potential defendant or not, has a constitutional right to have

a lawyer present with him in the grand jury room. The grand jury is an ancient institution and the only agency of our jurisprudence that is secretive. Its proceedings are not adversary. Its function is only investigative. It does not determine guilt or innocence. It determines only whether there is sufficient evidence to cause an accused to stand trial before a petit jury. There is no right of an accused to cross-examine witnesses or to introduce evidence in rebuttal. The grand jury has in all ages stood between the accused and his unjust accusers. One accused of crime may oftentimes, by himself testifying before the grand jury, clear up the charges against him so that no indictment is returned. Strang told Mr. Morris that he could testify voluntarily and may well have had the hope that he could explain his part in the Wayne-Franklin affair.

Admittedly *Escobedo*, *Miranda* and *Wade*[2] are not factually analogous to Strang's position in the case at bar. We are unwilling to extend the principle of those cases to the right of a potential defendant to have a lawyer present with him in the grand jury room. There are other means of protecting a defendant from abuse of power of a prosecutor or from a violation of constitutional rights.

There was no obligation on the part of the government counsel to notify Strang's counsel that Strang was subpoenaed before the grand jury. Strang himself had ample opportunity to do that. He was never denied the right to have his lawyer accompany him to the door of the grand jury room and to have him wait outside while he was testifying. He was given permission to use the telephone before going into the grand jury room and he was free to

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[2] *Escobedo v. Ill.*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436; *United States v. Wade*, 388 U.S. 218.

have called his lawyer then if he wished to consult with him.

Prior to trial, appellant Strang filed a motion under Rule 6(e)[3] of the F.R.Crim.P. to inspect the minutes of the Grand Jury. In support thereof Strang stated:

> "On December 27, 1965, defendant filed a Motion to Dismiss, in which he alleged violation of his constitutional rights, both with respect to the Grand Jury Proceedings which led to the founding of the Indictment and to the Indictment itself, and in which he alleged that the form and manner in which he was questioned before the Grand Jury prejudiced him in the eyes of the Grand Jury, thereby inducing the return of the indictment against him. Such Motion to Dismiss is hereby incorporated in this Motion."

The motion to dismiss alleged that Strang's constitutional rights "not to be a witness against himself" and to "have the assistance of counsel for his defense" were violated. The statement in his motion for inspection of the grand jury minutes concerning the manner in which he was questioned before the grand jury is taken almost verbatim from the motion to dismiss. The government submitted the transcript of Strang's appearance before the grand jury to the trial judge for an *in camera* inspection. The judge denied the motion. On appeal Strang only assigns as error

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[3] "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

the refusal of the trial judge to permit inspection of his own testimony before the grand jury.

The government concedes that under present Rule 16(a)(3),[4] effective July 1, 1966, the defendant would have been entitled to make such an inspection. However, the trial of this case was begun prior to the effective date of amended Rule 16, and is governed by the then prevailing law. Only upon a showing of a "particularized need" by a defendant, may a trial court intrude upon the secrecy of the grand jury proceedings and permit inspection of its minutes. *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, rehearing den. 361 U.S. 855; *Dennis v. United States,* 384 U.S. 855. The rule requiring a demonstration of a "particularized need," prior to July 1966, applied equally to testimony of the defendant himself as well as other witnesses. It is within the trial judge's discretion to grant or deny a request for inspection of grand jury minutes and a denial of such a request is reversible only if the trial judge abused his discretion.

Nothing in the grand jury minutes would shed any light on Strang's contention that he was denied his constitutional right to counsel before the grand jury. It is undisputed that he did not have one in the grand jury room with him when he was testifying. His request concerning counsel made to the prosecutor and the prosecutor's response thereto were not part of the grand jury proceedings and would not be contained in the minutes. It is also undisputed that the prosecutor advised Strang, outside of the grand jury room, of his right not to incriminate himself. The trial judge quoted the applicable portion of the grand jury min-

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[4] "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

utes wherein Strang was advised of his right not to incriminate himself in his memorandum opinion overruling Strang's motion to quash the indictment. No additional information concerning the alleged violation of his right not to be a witness against himself could be gleaned from inspecting the minutes.

Other than the mere conclusory statement in both the motion to dismiss the indictment and the motion to inspect the grand jury minutes that the form and manner in which Strang was questioned before the grand jury was prejudicial, there is nothing to support such an assertion.

Under these circumstances we think that no "particularized need" was demonstrated which would permit the trial judge to allow an inspection of the testimony of Strang before the grand jury. The resolution of the issue was within the discretion of the trial judge and we hold that his discretion was not abused.

We consider next the question of the sufficiency of the evidence raised by appellants Strang and Howard. Because of the complicated and involved nature of the transactions with which we are concerned, it is necessary to present the following somewhat detailed statement of facts.

Franklin is a Michigan Corporation, located in Detroit, whose business is the processing, closing and servicing of real estate mortgages, principally those insured by the FHA or guaranteed by the VA. Levinson is its president and major stockholder. Howard, who began working for Franklin in September, 1962, had the title of Executive Assistant. Cerwin, one of the principal government witnesses, became vice-president of Franklin in February, 1962. Franklin, as a "non-supervised" lender, was only able to secure VA guaranties on the prior approval basis. In 1962, and prior thereto, Franklin was having difficulty in getting guaranties on some of the loan applications it

submitted to the VA because the veterans were poor credit risks. In early 1962, Cerwin met with Paul Kelly, head of the loan guaranty division of the Detroit VA office, in Kelly's office. Kelly told Cerwin that some of Franklin's loans were poor risks and requested Franklin not to burden the VA with such unnecessary work.

In 1962 Franklin became aware of the process of obtaining VA guaranties on an "automatic basis." Thereafter it entered into accommodation arrangements with "supervised" lenders who could automatically secure VA guaranties. Under these arrangements Franklin would process loan applications and submit them to the supervised lender who would make an independent check of the application to see if it conformed with the applicable statutes and regulations, and to determine if the veteran was a satisfactory credit risk. Upon approval of the loan, the loan would be closed by the "supervised" lender who would apply for an "automatic" guaranty from the VA. After receiving the guaranty, the supervised lender would assign the mortgage back to Franklin. Such accommodation arrangements, wherein the "supervised" lender made an independent check of the veteran's credit and qualifications, were not illegal prior to June, 1963.

The "supervised" lenders were rejecting some of the loans submitted to them by Franklin and indicated to Franklin that they would not renew their arrangements and commitments after the expiration of their terms. In August, 1962, Kelly wrote a long letter to Levinson dealing with Franklin's deficiencies in connection with submissions to the VA of 48 cases submitted through a supervised lender. Because Franklin needed new "automatic" sources through which to process VA loans, Levinson directed Howard to seek out supervised lenders who would be interested in entering into such accommodation arrangements.

In early December, 1962, Howard contacted Edward P. Strang, President of Wayne National Life Insurance Company, a small company with its office in Detroit, Michigan. Harold Bayer was General Counsel of Wayne, an officer, and a member of the Board of Directors and the finance committee. Kenneth Koppin was Executive Vice President of Wayne and managed the everyday affairs of the company. After Howard explained to Strang that Wayne could process VA mortgages on an automatic guaranty basis, Howard arranged a meeting between Strang and Levinson.

In mid-December, 1962, Strang met with Levinson, Howard and Cerwin at Franklin's offices. The nature of the VA loan guaranty program was explained to Strang and discussed. A subsequent meeting was held several days later. It was agreed at these meetings that Franklin would originate and process approximately $200,000 worth of loans to be made by Wayne who would submit them to the VA for automatic guaranties. After receiving the guaranty, Wayne would assign the loans to Franklin. Wayne would receive a 1% fee on the closing and a 1% fee on the assignment of the loan to Franklin. A contract dated December 20, 1962, and signed by Strang on behalf of Wayne, and Levinson on behalf of Franklin, outlined several portions of the agreement between the parties. The government has not contended and does not contend that this written agreement violates the law.

Cerwin testified that it was agreed between Wayne and Franklin that Wayne's sole task was to supply the money and obtain the VA guaranty in its name, and that Franklin would attend to all the details, including the credit check. Strang's statement which he made to the FBI is to the same effect. Levinson disagreed with this characterization of the arrangement and testified that it was his understand-

ing that Wayne would perform the credit analysis as did the other supervised lenders with whom Franklin had accommodation arrangements.

On December 21, 1962, Strang, in agreement with Koppin, discussed the desirability and legality of the contract with Bayer. Strang informed Bayer of the nature of the agreement and the VA loan guaranty program. According to Strang, he submitted the matter to Bayer for his review and approval. However, Strang neglected to inform either Koppin or Bayer that he had already signed the agreement with Franklin on the preceding day. Furthermore, he did not inform them that he had also signed a letter, dated December 21, 1962, to Levinson authorizing Franklin to close 22 loans at 91% of par.

In order to submit loans to the VA through Wayne, Levinson contacted Mitchell of Rem Realty and told him to bring down some business as Franklin had a new source who could secure guaranties on the automatic basis. Rem Realty Company was a Michigan corporation whose main business was to buy old houses in the run-down inner city area and try to sell them to veterans in hopes of obtaining a VA loan guaranty. Mitchell and Medinis were the principal stockholders of Rem, but because of their prior involvement with bankrupt operations, had others pose as the officers and directors of Rem. Rem falsified the credit reports of veterans in the hope that the applications would then be accepted for a VA guaranty. Cerwin who was present when Levinson telephoned Mitchell, testified that Levinson told Mitchell that the new source for VA guaranties "would take anything" regardless of the credit of the veterans, including "derogs." "Derogs" is a term used in the mortgage business to refer to derogatory or poor credit risks. Mitchell told Medinis to take all VA cases, regardless of anything, over to Levinson. Medinis and

Mitchell brought approximately 12 to 15 cases to Franklin's office, which they characterized to Cerwin and Dorothy Stuart, Cerwin's secretary, as bad risks and "garbage," another term in the mortgage business meaning poor credit risks. Cerwin told Levinson that the Rem loans were poor credit risks and that Franklin was looking for trouble if they submitted them to the VA. Levinson ordered Cerwin to process them anyway. Levinson denied everything except telling Mitchell to bring in some cases as they had a new source.

Approximately 22 loans, 15 of which were from Rem, were "closed" between December 26th and December 31, 1962. The loans were closed at the offices of Burton Abstract Company. Inasmuch as Wayne had not yet authorized the disbursement of funds to cover the loans, the closing papers were signed by the respective parties and held in escrow by Burton. The "closings" were most unusual in that they were completed before the loans were processed and before they were submitted to a "supervised" lender for an independent credit check and approval. The papers for the "closing" were all prepared at the offices of Franklin. In connection with the submission of the loans to the VA, false information concerning the credit of the veterans was prepared and the signatures of numerous veteran borrowers and Strang were forged. Dorothy Stuart, Cerwin's secretary, testified that both Cerwin and Howard directed her to sign the names of Strang and the veteran borrowers to various documents that were thereafter submitted to the VA. She was further told by both Cerwin and Howard that Strang had authorized the signing of his name. Howard and Cerwin denied this.

A partial disbursement of Wayne funds was made by check dated January 4, 1963, and negotiated on January 7th, both prior to any formal approval of the loans by

Bayer. Contrary to Strang's intimations, this initial disbursement was prior to any authorization by Bayer. Koppin signed the check at his home where it had been brought by Nancy Murray, a Wayne secretary, and Howard. Koppin testified that he signed the checks on the assurances of Strang that it was a transaction separate from the Franklin arrangement and involved "good" mortgages. He further stated that had he known that the check was in connection with the Franklin arrangement he would not have signed it because Bayer had not yet given his approval. This disbursement was made out of additional funds Wayne had available for investment.

On January 8, 1963, after the loans had been closed in escrow and after an initial disbursement had been made thereon, Cerwin and another Franklin employee, brought the files of the cases to Bayer's office. Cerwin testified that Strang, who arrived shortly after he did, made the statement that they were going to go through the motions of approving the loans. At this meeting and one held the following day, Bayer would not authorize the disbursement of Wayne funds unless Franklin executed an unconditional agreement to buy back any mortgage that the VA refused to guarantee. Cerwin said such an agreement was satisfactory but that Levinson had to sign it. Thereupon Bayer authorized the disbursement of funds to cover the first group of closed loans. Levinson at first signed the agreement, but thereafter excised his signature. When Bayer learned of this, he wrote Strang and advised him that he was not in favor of this arrangement with Franklin unless they had such an agreement and questioned whether Franklin was the "type of company we wish to do business with." Howard later signed a buy-back agreement telling Bayer that he was not an officer of Franklin and that he had no authority to sign the agreement. Bayer

then authorized the disbursement of the balance of the funds, and never formally revoked his authorization.

Sometime in January, 1963, Levinson suggested to Strang that an extra point be paid upon the closing of the loan. Levinson testified that Mitchell told him that Rem was very anxious to close the deals and would be willing to pay an extra point to expedite the matter. Strang agreed and told Levinson to pay part of the extra-point moneys to him personally and part to the First Fidelity Corporation, a family-owned corporation of which Strang was a major stockholder.

Late in January and early February 1963, the first loan packages were sent to the VA for its guaranties. Franklin made the actual submissions but accompanied them with a covering letter on Wayne stationery. Strang had sent Wayne stationery over to Franklin's office, and told Dorothy Stuart to contact his secretary when she needed more. In early February 1963, the VA approved Wayne as a "supervised lender" under its guaranty program. At this point the VA was not aware of Franklin's interest in the loans. An examination of the loan packages by the VA indicated that most were poor credit risks and the proper standards had not been followed. Seven of the 22 applications submitted by Wayne were rejected by the VA.[5] Kelly, loan guaranty officer at the Detroit office of the VA, asked another employee to arrange for Strang to come to their office and discuss the loan program. Strang

[5] The VA's rejection of seven of Wayne's applications for guaranties was based on the following statement from the Veterans Administration Lenders Handbook, Section 1032:

> "In the absence of fraud or material misrepresentations, the VA will not substitute its judgment for the lender's as to the credit risk assumed in any particular case nor question the validity of a guaranty already issued."

declined to go but sent his personal secretary, Arnold Tunesi. Howard accompanied him. Strang told Howard not to reveal that Howard was associated with Franklin. Howard introduced himself at the VA as "Mr. Ross." A VA official lectured Tunesi and Howard about the bad credit risks being submitted by Wayne. This meeting was followed by a letter to Strang, three weeks later, explaining in detail the objections of the VA and warning that if Wayne's performance did not improve, it would be placed on a "prior approval" basis.[6]

On March 1, 1963, Strang resigned as President of Wayne, but remained on its Board of Directors and its Finance Committee.

It is apparently conceded by all that conviction on the substantive counts of the indictment is contingent upon a finding that the appellants were members of a conspiracy and that the acts which are the subject of the substantive charges were committed in furtherance of the conspiracy. It is conceded that there are false and fraudulent statements contained in the documents submitted to VA.

Strang contends that the agreement between Wayne and Franklin was not illegal and therefore he could not be guilty as charged. The government concedes that accommodation arrangements between "supervised" and "non-

[6] "If after a reasonable period the lender fails to demonstrate satisfactory performance, consideration will be given to the possibility of requiring prior approval for all future loans." Veterans Administration Lenders Handbook, Section 1032.

supervised" lenders were not inherently illegal at the time of the transactions involved herein.[7] The government does not contend that the written agreement dated December 20, 1962, between Franklin and Wayne violates the law. Rather it is the government's position that Levinson, Franklin, Howard, Strang and the other conspirators went beyond the bounds of legal action and conspired to defraud the United States of the lawful operation of its VA home loan guaranty program by submitting to the VA for automatic guaranty, through Wayne, a "supervised" lender, loans which the parties knew did not meet the requirements of Section 1801 et seq. and the rules and regulations promulgated thereunder.

Appellants Strang and Howard contend that there is insufficient evidence to support the jury's verdicts of guilty.[8] An appellate court's function in reviewing the verdict of a jury is very limited. We do not sit as a trier of fact and will not enter into a de novo consideration of the evidence. The verdict of the jury cannot be reversed if there is substantial evidence to support the findings of guilt. *Glasser v. United States,* 315 U.S. 60; *United States v. Knight,* 336 U.S. 505. In considering the sufficiency of the evidence, we do not determine whether it establishes guilt beyond a reasonable doubt, but only that the evidence would permit the triers of facts to find the defendants guilty beyond a reasonable doubt. *Ramsey v. United States,*

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[7] In a general information letter dated June 1, 1963, the VA stated:

"The V.A. has re-examined its position and has determined, as a matter of administrative policy, that the interest of the Government and of lenders and veterans will be best served by requiring supervised lenders to discontinue the closing of loans on the automatic basis in those instances where such closing would be for the accommodation of a non-supervised lender, i.e., closing under the automatic procedure will have the effect of enabling the non-supervised lender to do indirectly what it may not do directly."

[8] Levinson does not argue the sufficiency of the evidence.

248 F.2d 740 (C.A. 6); *United States v. Ragland,* 306 F.2d 732 (C.A. 4) cert. den. 371 U.S. 949. In considering the sufficiency of the evidence in a criminal case, we must construe the evidence most favorably to the government. *Glasser v. United States, supra.* This includes the drawing of all reasonable inferences and reasonable credibility determinations favorable to the government. *Glasser v. United States, supra; United States v. Decker,* 304 F.2d 702 (C.A. 6). To do otherwise would usurp the prerogatives of the jury.

The following quotation from the Court's opinion in *United States v. Luxenberg, supra,* at pp. 249-250, concerning knowledge of and participation in a criminal conspiracy is relevant to the questions raised by appellants herein on the sufficiency of the evidence:

> "Knowledge, like intent, is a factual issue which may be proved by circumstantial evidence. Whether a conspiracy exists is likewise a factual question . . . It is not fatal to the prosecution's case that it does not prove that the defendants knew or participated in every phase of the unlawful scheme. (Citations omitted.) It is only necessary that a defendant know of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance. (Citations omitted.) Participation in a conspiracy need not be proved by direct evidence. '(A) common purpose and plan may be inferred from a "development and collocation of circumstances." (Citations omitted.) It is not necessary that there be a formal agreement in order to have an unlawful conspiracy. (Citations omitted.) "Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose." '" (Citations omitted.)

Applying those principles to the evidence that was before the jury, we conclude that there was sufficient evidence to support the jury's verdicts of guilty against Howard and Strang. Howard was the one who introduced Levinson to Strang and made the initial contact with Wayne. He was present at the initial meeting between Levinson and Strang. According to Dorothy Stuart's testimony, Howard directed her to sign the names of the veterans applying for loans and of Strang. Howard accompanied Nancy Murray to Koppin's house where Koppin signed a check dated January 4, 1963, under misleading representations. Howard eventually signed the buy-back agreement requested by Bayer. Further, Howard accompanied Tunesi to the VA offices where he introduced himself as "Mr. Ross" to avoid making known his relation to Franklin. There is further evidence that Howard visited at least one veteran who had not yet occupied the home involved and threatened him with criminal prosecution if he did not move in.[9] He also arranged for certain mortgages to be kept current by bringing checks to the veterans for their endorsement, which checks were then recorded by Franklin as mortgage payments.[10] This evidence, together with all the other evidence presented to the jury, is sufficient to support the guilty verdict entered against Howard.

If the evidence relative to Strang merely supported a finding of imprudent business practices or acumen, the jury would not have been warranted in returning a verdict of guilty against him. However, this was not the case. Strang signed the agreement with Franklin on December 20, 1962, and thereafter attempted to secure the approval

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[9] The VA regulations require that a veteran occupy the home on which a guaranty is sought.

[10] By keeping the payments up to date, appellants were trying to prevent the government from contending that the loans were bad.

of Wayne's general counsel without informing him that he had already executed it. A letter dated December 21, 1963, and signed by Strang, gave Franklin permission to close 22 loans at a time when no one at either Franklin or Wayne had made a proper credit check. Furthermore, 22 loans were closed before the end of the year, prior to securing Bayer's approval of the arrangement. Cerwin testified that Strang said that he was going through the motions of approving the loans. Strang personally signed some of the reports sent to the VA which stated that the loans met the requirements of the statute and regulations, when in fact they did not and when Strang hardly examined the files. Strang arranged for the partial disbursement of funds by check, dated January 4, 1963, by misleading Koppin as to the purpose for which the funds were required. Strang supplied Franklin with Wayne stationery and told Dorothy Stuart to contact his secretary when she needed more. Strang told Howard to conceal his connection with Franklin when Howard accompanied Tunesi to the VA's offices. Strang personally, and a corporation of which Strang was a major stockholder, profited on the extra point Rem Realty agreed to pay. This evidence taken in conjunction with the other evidence before the jury is sufficient to support its finding of Strang's guilt.

Appellants Levinson, Franklin and Strang contend that the trial judge committed reversible error in permitting the government, over objection, to elicit testimonial evidence concerning transactions involving the FHA. The evidence concerned the false and fraudulent obtaining of FHA mortgage insurance on two loans previously rejected by the VA which were the subject of counts 26 to 33 of the indictment. These counts were severed from the trial in the instant case. However other aspects of these two loans

involving veterans Reese and Spates, were the subject of several substantive counts of the indictment which were submitted to the jury.

Strang contends that the evidence was inadmissible because it concerned matters and dealings with which he had no connection and because the acts were committed subsequent to the termination of conspiracy with which he was allegedly connected. Strang relies on the well settled principle of law that the declarations of a co-conspirator made after the termination of the conspiracy and not in furtherance thereof are admissible only against the declarant and not against the other alleged conspirators. See, *Krulewitch v. United States,* 336 U.S. 440. While *Krulewitch* may apply to declarations of conspirators, the case does not govern evidence of acts of co-conspirators committed subsequent to the termination of the alleged conspiracy which are admissible if relevant to prove the conspiracy and which demonstrate its existence and illegal purposes. *Lutwak v. United States,* 344 U.S. 604, rehearing den. 345 U.S. 919. Cerwin's testimony was relevant to prove the aims of the conspirators and the manner in which similar frauds were perpetrated and as such were admissible against all appellants.

Appellants Levinson and Franklin argue that the admission of such testimony was contrary to the trial judge's original order severing counts 26 through 33 from the trial herein and was extremely prejudicial to their positions. The mere granting of a severance does not thereafter preclude a trial judge from admitting evidence relating to crimes which are the subject of the severed counts of an indictment if such evidence satisfies the applicable rules of relevancy to the issues of the case on trial. As indicated above such evidence was clearly admissible.

We hold that the trial judge did not abuse his discretion and thereby commit error in permitting Cerwin to testify concerning the securing of FHA mortgage insurance on the Reese and Spates loans.

During the course of the trial, over the objection of Franklin's and Levinson's counsel, F.B.I. Agent Bolton testified to the substance of an oral statement made to him by their co-defendant Strang and the government introduced into evidence the unsigned copy of the statement itself. Prior to Bolton's testimony and the receipt of the statement into evidence, the judge cautioned the jury that both the written and oral statements were admissible against Strang only and could not be considered against any of the other co-defendants. Appellants Franklin and Levinson contend that the trial judge committed reversible error in not sustaining their objections to such evidence. Strang's statements were not confessions of guilt. Levinson and Franklin characterize them as exculpatory as to Strang and extremely inculpatory as to themselves. Levinson and Franklin object to those portions of Strang's statements which indicate that Levinson and Franklin agreed to assume full responsibility for examining and approving mortgages as far as credit was concerned, on behalf of Wayne and that Levinson, Howard and Cerwin had forged his signature on letters and documents submitted to the Veterans Administration.

In support of their position, appellants Franklin and Levinson, rely primarily on the recent Supreme Court decision in *Bruton v. United States,* 391 U.S. 123. *Bruton* in overruling *Delli Paoli v. United States,* 352 U.S. 232, held that a defendant's right to cross-examination may be violated by the introduction into evidence, in a joint trial, of a co-defendant's incriminating extra-judicial statements. In the circumstances, of that case, the Supreme Court held

that cautionary instructions by the judge to the jury could not eliminate the substantial prejudice to the petitioner. In *Roberts v. Russell,* 392 U.S. 293, the Supreme Court held that the *Bruton* rule was retroactive. But *Bruton* clearly recognized that "(n)ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Bruton v. United States, supra.* Cautionary instructions are impotent to overcome those situations in which there is great risk that the jury will not or cannot abide by the judge's instructions to the detriment of the defendant's vital interests. The Supreme Court characterized the statement of *Bruton's* co-defendant as "powerfully incriminating."

Strang, like *Bruton's* co-defendant, did not take the stand. Contrary to Franklin's and Levinson's assertions it cannot be said that the allegedly inculpatory portions of Strang's oral and written statements had a devasting effect on the minds of the jurors. Franklin and Levinson argue that Strang's extra-judicial statements regarding Levinson's and Franklin's alleged assumption of complete responsibility for checking credit "was unequivocally the most damaging information reaching the jury box concerning the appellants Levinson and Franklin Mortgage." However the case may be, the record is replete with other evidence and testimony to the same effect. Cerwin testified that at a meeting attended by Levinson, Strang and himself, Levinson agreed on behalf of Franklin to assume the responsibility in regards to making an analysis of the credit. The testimony of Dorothy Stuart, a secretary and clerk at Franklin, further indicates that Franklin closed loans without first submitting the papers to Wayne for

processing. Medinis testified that when Levinson called him he told him that all Medinis' applications for mortgages would be approved "regardless of anything.". Cerwin corroborated this testimony and further testified that after both he and Medinis commented on the poor quality of the applications, Levinson ordered Cerwin "to go ahead and process them anyway." Other evidence and testimony further supports the view that Franklin and Levinson knew that a good number of applications were from extremely poor credit risks and that Wayne would not and could not make a credit check, but relied upon the office of Franklin to perform the check.

Levinson argues that Strang's statements to the effect that he "did not authorize Levinson, Howard, Cerwin or anyone else to sign my signature" implied that Levinson was guilty of such wrongdoing. In view of the other evidence presented at the trial, little weight must be given to this argument. Dorothy Stuart testified that she signed Strang's name to various documents at the insistence of Cerwin and Howard. Furthermore, because of the fact that Strang's signature was required on various documents sent directly by Franklin to the Veterans Administration, it must be assumed that someone at Franklin had directed the signing of Strang's name on the documents.

In view of the fact that Strang's statements added little, if anything, to a record replete with similar and corroborative evidence, it cannot be said that the cautionary instructions accompanying the admission into evidence of Strang's oral and written statements was insufficient to eliminate any possible prejudice to Franklin and Levinson. Furthermore, we conclude that the admission of such statements, even if it be considered error, was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, rehearing den. 386 U.S. 987.

Contrary to appellants Levinson's and Franklin's contentions we hold that it was proper for the trial judge to permit testimony concerning the practices of prudent lenders in the Michigan area. Such testimony was relevant because it provided the background information concerning the transactions with the VA, explained the procedures used in the Detroit VA office and established the effect or materiality of the allegedly false statements contained in the documents submitted to the VA.

Strang contends that the trial judge committed error in failing to instruct the jury as he requested with respect to the conspiracy count. The government presented its case on the basis of a single conspiracy which had as its purpose the defrauding of the United States and the violation of Section 1001, Title 18, U.S.C. Strang's theory was that there was not one over-all conspiracy, but that there were actually two separate and distinct conspiracies, one to avoid the statutory and regulatory requirement that the supervised lender exercise its independent judgment as to the qualifications of the loan, and the other to submit false statements concerning the loan applications to the VA. Strang contended that even if he was a member of the first conspiracy, he was not and could not be connected with the second. In accordance with this position, Strang requested the trial judge to charge the jury that if Strang was a member of only one prong of the conspiracy and not a member of the over-all conspiracy, Strang should be acquitted on Count one of the indictment. The trial judge agreed with the government's contention that this was a single conspiracy aimed at thwarting the lawful operation of the VA home loan guaranty program. The government submitted the case on this basis, the court instructed the jury on this basis, and there was more than sufficient evi-

dence to support the jury's implicit finding of a single conspiracy charge as requested by Strang. He stated:

> "I think I indicated I saw no evidence of any secondary agreement. There is one conspiracy here or there isn't any. At least that is my conclusion from the testimony."

We have carefully reviewed the entire record in this case and hold that the trial judge was correct in denying Strang's request for a multiple conspiracy charge.

We find no merit to Strang's claim that the trial judge did not properly instruct the jury on the defense of advice of counsel. It is questionable that he was entitled to any instruction on that defense. Admittedly Strang did not fully advise his counsel as to all of the circumstances of the transaction and he signed the agreement on December 20th before he consulted his lawyer. It was not the contract itself which was illegal but the conduct under it, of which counsel was not fully advised, that constituted the conspiracy. On December 21, 1962, prior to obtaining any approval of Wayne's General Counsel, Strang signed a letter authorizing Franklin to close 22 loans.

Appellants Strang, Levinson and Franklin contend that reversible error resulted from the trial judge's refusal, in his charge, to read, explain and interpret pertinent regulations of the VA concerning the home loan guaranty program. The pertinent regulations were read to the jury numerous times during the course of the trial. Defense counsel referred to them extensively during opening statements and closing arguments. Kelly of the VA was on the witness stand for nine days during which time he was examined and was examined extensively on the meaning of the regulations. The "Lenders Manual," published by the VA, was introduced into evidence and was available to the

jury during its deliberations. The trial judge referred to and quoted several parts of the VA's regulations and manual in his charge to the jury. The meaning and substance of the regulations were adequately before the jury and the trial judge did not err in denying Strang's, Levinson's and Franklins' requested instructions concerning the interpretation and meaning of the regulations. No claim is made, and none can be made, that the trial judge improperly instructed the jury on the elements necessary to find appellants guilty of conspiracy and the various substantive offenses charged.

Judgment affirmed.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

UNITED STATES CODE

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

* * * * *

§1002. Possession of false papers to defraud United States

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

* * * * *

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

* * * * *

§1801. Definitions

(a) For the purposes of this chapter—

(1) The term "World War II" (A) means the period beginning on September 16, 1940, and ending on July 25, 1947, and (B) includes, in the case of any veteran who enlisted or reenlisted in a Regular component of the Armed Forces after October 6, 1945, and before October 7, 1946, the period of the first such enlistment or reenlistment.

(2) The term "veteran" includes the widow of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability, but only if such widow is not eligible for benefits under this chapter on the basis of her own active duty. The active duty of her husband shall be deemed to have been active duty by such widow for the purposes of this chapter.

(b) Benefits shall not be afforded under this chapter to any individual on account of service as a commissioned officer of the Coast and Geodetic Survey, or of the Regular or Reserve Corps of the Public Health Service, unless such service would have qualified such individual for benefits under title III of the Servicemen's Readjustment Act of 1944. Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1203.

* * * * *

§1802. Basic entitlement

* * * * *

(d) Loans will be automatically guaranteed under this chapter only if made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State, or (2) by any State. Any loan proposed to be made to a veteran pursuant to this chapter by any lender not of a class specified in the preceding sentence may be guaranteed by the Administrator if he find that it is in accord otherwise with the provisions of this chapter.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 995

ROSS HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1089

BENJAMIN LEVINSON and FRANKLIN MORTGAGE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. in No. 995 App. A; Pet. No. 1089 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. The petition for a writ of certiorari in No. 995 was filed on January 29, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari in No. 1089 to February 28, 1969, and on February 26, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 995:

1. Whether the conspiracy count failed adequately to charge the offense of conspiring to defraud the United States.

2. Whether the conspiracy statute in defining an illegal conspiracy as one whose objective is either to commit an offense against the United States or to defraud the United States was intended to create two mutually exclusive crimes.

3. Whether the conspiracy to defraud the United States clause of 18 U.S.C. 371 is unconstitutionally vague.

In No. 1089:

4. Whether the admission into evidence of a statement of one of petitioners' codefendants, which allegedly implicated petitioners Levinson and Franklin, required reversal despite the fact that the record is replete with similar and corrobative evidence of every fact contained in the statement.

5. Whether the trial judge erred in refusing to explain and interpret in his charge all the various regulations of the Veterans Administration concerning the home loan guaranty program.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Michigan, petitioners were convicted of violating 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 1001 and to defraud the Veterans Administration, by preventing it from having its loan guaranty program administered in accordance with the provisions of 38 U.S.C. 1801 *et seq.* and the rules and regulations promulgated thereunder and of related substantive offenses. The substantive violations charged in counts 2 through 25 of the indictment arose out of the conspiracy and charged either petitioners or their codefendants with specific violations of 18 U.S.C. 1001 by submitting documents containing false and fraudulent statements to the Veterans Administration.[1] On June 19, 1967, petitioners Levinson and Howard were sentenced to pay fines of $10,000 each and to imprisonment for eighteen months under the provisions of 18 U.S.C. 4208 (a)(2), and petitioner Franklin Mortgage Corporation was fined $10,000.

Petitioners do not challenge the sufficiency of the evidence to support their convictions. A detailed statement of the facts concerning the complicated trans-

[1] Petitioners were each convicted on every count in which they were charged.

actions underlying their convictions is contained in the opinion of the court of appeals (see Pet. in No. 1089 App. A. 45-52). Thus, we merely outline here the highlights of the scheme proved at trial and those additional facts necessary for a resolution of the issues raised by petitioners in this Court.

1. The Veterans Administration's home loan program is based upon 38 U.S.C. 1801 *et seq.* which provides for the issuance by the VA of guaranties on mortgage loans made to veterans. Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Automatic guaranties are made on loans by "supervised lenders"—*i.e.*, any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Where automatic guaranties are involved the supervised lender is responsible for determining whether the loan meets the requirements of the statute and regulations. "Non-supervised lenders"—*i.e.* those not subject to the supervision of a federal or state agency—must seek guaranties on the "prior approval basis." Under this system, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. The VA would make this determination on the basis of the information which must be submitted to it by the lender. If the loan is held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA which issues its guaranty (336a).[2]

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[2] Record references are to the Joint Appendix filed in the court of appeals and to the Government's appendix to its brief

Petitioner Franklin Mortgage Corporation was a non-supervised lender and petitioner Levinson was its president and major stockholder (341a). Petitioner Howard began working for Franklin with the title of Executive Assistant in September, 1962 (577a).

Franklin, as a non-supervised lender, was only able to secure VA guaranties on the prior approval basis. During the latter part of 1962, it was having difficulty in getting guaranties on some of its loan applications; 21 of its 46 loan submissions were rejected by the VA because the applicants were poor credit risks (449a). Thereafter, Franklin entered into accommodation arrangements with several supervised lenders who could automatically secure VA guaranties. Under these arrangements, Franklin would process loan applications and submit them to a supervised lender which would make an independent determination as to whether the veteran was a satisfactory credit risk. After approving the loan, the supervised lender would close the loan and apply for an automatic guaranty from the VA. After the guaranty was received, the supervised lender would assign the mortgage back to Franklin (574a-576a, 1380a). Such accommodation arrangements were not illegal at the time so long as the supervised lender made an independent check of the veteran's credit and qualifications.

After the supervised lenders rejected some of the loans submitted to them by Franklin and several of

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in the court of appeals ("G.A.") copies of which we are lodging with the Clerk of this Court.

these lenders indicated that they would not renew the arrangements when their terms expired (1354a-1355a, 1562a-1563a), Levinson directed Howard to seek supervised lenders who would be interested in entering into accommodation arrangements (1566a-1567a, 1265a). In December, 1962, Howard contacted Edward P. Strang president of Wayne National Life Insurance Company, a supervised lender, and explained to him that Wayne could process V.A. mortgages on an automatic guaranty basis. Subsequently Levinson and Strang met and entered into a written contract dated December 20, 1962, under which Franklin would originate and process approximately $200,000 worth of loans to be made by Wayne which would submit them to the VA for automatic guaranties. After receiving the guaranties the loans would be assigned by Franklin to Wayne (1289a-1292a; 1947a-1949a). Wayne was to receive a fee of 2% on each loan thus processed. Robert Cerwin, a vice-president of Franklin, testified that it was agreed between Wayne and Franklin that Wayne would obtain the VA guaranties but Franklin would attend to all the details including the credit check (581a-583a).

Levinson thereafter contacted Rem Realty, a small real estate corporation dealing mostly with inner city properties and poor credit risks, which had in the past falsified credit information (1059a-1062a). He told its owners that he had a new source who could secure VA guaranties on an automatic basis (870a-873a), and would accept anything regardless of the credit risks involved. Rem Realty thereafter brought to Franklin's office approximately 12 to 15 applications

which were characterized by its sales manager as "garbage"—*i.e.*, exceptionally poor credit risks (869a-875a, 589a-591a). An officer of Franklin, after examining some of these files and noting that some of the loans had been previously rejected, warned Levinson that Franklin was looking for trouble if these loan applications were submitted to the VA for automatic approval. Levinson, however, ordered that the applications be processed (595a-597a).

The papers in connection with the submission of 22 loans (including these 15 from Rem) were prepared at Franklin. These papers contained false information concerning the credit of the veterans and in a number of instances the signature of the veteran borrower was forged (826a-827a, 1059a-1061a). No submission was made to Wayne for an independent credit check. After the loans were already closed, Strang went "through the motions" of approving the loans for Wayne (600a). Late in January and in early February 1963, the loan packages were sent to the VA for its guaranties. Although Franklin actually made the submissions the covering letter was on Wayne stationary (346a, 1014a, 1913a).

2. An F.B.I. agent testified at trial, over objection by petitioners Levinson and Franklin, concerning an unsigned statement given by codefendant Strang to the F.B.I. after the termination of the conspiracy (1188a-1204a). In this interview Strang stated, *inter alia*, that Levinson and the Franklin Corporation, not Wayne, were responsible for checking the credit risk of the loans submitted to the VA (1188a-1204a).

Strang himself did not testify at the trial.[3] During cross examination by counsel for Strang the entire unsigned written statement was admitted into evidence over objections by petitioners' counsel (1233a-1246a).

ARGUMENT

Petitioner Howard (No. 995) makes a three pronged attack on the conspiracy count contained in the indictment. He contends that it insufficiently charged the offense of conspiring to defraud the United States; that the "either"—"or" structure of the statute[4] bars the charging of both a conspiracy to commit offenses against the United States and a conspiracy to defraud the United States arising out of the same conduct; and finally that if the conspiracy count is held to be sufficient to charge the offense of conspiracy to defraud the United States then the conspiracy statute is void for vagueness.

1. A valid indictment must apprise the accused of the nature of the charges with enough specificity so that he can prepare a defense and it must be framed so that it can serve as an adequate basis for a plea of double jeopardy if subsequent charges involving the same conduct are brought against the accused. *United States* v. *Debrow*, 346 U.S. 374, 376, 378. The conspiracy count in this case met these requirements.

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[3] Strang was also convicted at the trial and on appeal his conviction was affirmed by the court of appeals. He has not filed a petition for certiorari in this Court.

[4] 18 U.S.C. 371 makes it a crime for "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States * * *."

Paragraph 3 of Count I dealing with the defrauding aspect of the charge alleged (9a):

> (3) It was a part of said conspiracy that the defendants would represent that Wayne National Life Insurance Company processed loans to veterans (authorized pursuant to section 1802(d), Title 38 United States Code) and submitted these loans to the Veterans Administration for automatic guaranty, when in fact the aforesaid loans were, as intended by the defendants, processed by the Franklin Mortgage Corporation (not authorized pursuant to Section 1802(d) Title 38, United States Code to take such action) as the intended mortgagee.

Paragraph (4) enumerated those applications and loan documents containing the false statements made to the V.A. in furtherance of the conspiracy (9-10a).

The indictment thus charged a conspiracy to defraud the United States by circumventing the credit checking procedures of a statutory scheme designed to assist veterans in the purchase of homes, and by the submission of documents containing false and fraudulent statements. It thus charged a fraud on the United States. See *Dennis* v. *United States*, 384 U.S. 855; *United States* v. *Johnson*, 383 U.S. 169, 172; *United States* v. *Keitel*, 211 U.S. 370.

2. The contention that the conspiracy count was defective because it alleged violations of both aspects of 18 U.S.C. 371 is insubstantial. The same conduct may constitute a conspiracy both to defraud the United States and to commit offenses against the United States. It is proper to refer to both objectives in a single count of an indictment since it is only a

single offense which has been committed, and only a single sentence may be imposed. *United States* v. *Manton*, 107 F. 2d 834, 838 (C.A. 2), certiorari denied, 309 U.S. 664; Cf. *Dennis* v. *United States*, 384 U.S. 855, 859-864; *Glasser* v. *United States*, 315 U.S. 60, 66-67.

3. Nor can it be said that to construe the conspiracy statute so that it applies to reach the conspiracy shown here renders the statute void for vagueness. Just as the generic term fraud has a well understood meaning, so the terms used in this statute "to defraud the United States * * * in any manner or for any purposes" likewise have a well recognized meaning. See *Hammerschmidt* v. *United States*, 265 U.S. 182, 188; *United States* v. *Keitel*, 211 U.S. 370; *Hyde* v. *Shine*, 199 U.S. 62, 78-83.

4. The trial here was completed in July 1966, almost two years before this Court decided *Bruton* v. *United States*, 391 U.S. 123. Relying upon *Roberts* v. *Russell*, 392 U.S. 293, petitioners Levinson and Franklin contend (Pet. No. 1089, pp. 13-21) that the principles enunciated in *Bruton* require reversal of their convictions. The gist of their complaint is that the admission of the statement of co-defendant Strang, who did not take the stand, prejudiced them because it contained assertions that Levinson agreed that Franklin would assume the full responsibility for checking the credit risk on the loans to be submitted to the VA by Wayne (Pet. 8-10).

It should first be noted that the Strang statement is not a confession and does not directly implicate Levinson. Moreover, as the court of appeals pointed out

the case presented by the government at this twelve week trial "is replete with other evidence and testimony to the same effect" (Pet. No. 1089, App. A 59). Thus, Robert Cerwin an officer of Franklin, who was closely involved in the arrangements between Franklin and Wayne, testified that at a meeting between Levinson, Strang and himself it was agreed that Franklin would bear the responsibility of checking credit (581a-583a). In addition, a secretary testified that Franklin closed loans without first submitting the papers to Wayne (820a-824a). Moreover, the detailed testimony concerning the willingness of Levinson and Franklin to accept and process the loan applications described as "garbage" shows that it was never their intention that Wayne—or for that matter anyone else —would check the credit risks involved to see if they satisfied VA requirements. In short, this case is completely unlike either *Bruton* or *Roberts*, where the "powerfully incriminating" confession of one defendant implicating another was "deliberately spread before the jury in a joint trial" (391 U.S. at 135-136). The government proved its case against petitioners Levinson and Franklin from the direct testimony of its witnesses and its documentary exhibits, not from a co-defendant's statement. Considering further that insulating instructions were given to the jury,[5] the court of appeals correctly decided in the circumstances

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[5] As this Court pointed out in *Bruton* (391 U.S. at 135) "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

of this case that the admission of this evidence did not constitute reversible error. *Chapman* v. *California*, 386 U.S. 18; Cf. *Lutwak* v. *United States*, 344 U.S. 604, 619-620.

There is no conflict concerning the impact of *Bruton* between the decision of the court below and the Third Circuit's decision in *United States ex rel. Johnson* v. *Yeager*, 399 F.2d 508 (C.A. 3). In that case the court rejected the argument that the admission of the confessions of two co-defendants, each implicating the confessor and his co-defendant was harmless error. However, the Court rested its decision on the fact that the two confessions differed as to the relative role each defendant played in the murder and that this may have affected the jury's determination that the death penalty should be imposed on both defendants. Indeed, in another recent case the third circuit applied a harmless error rule in considering an alleged violation of the principles of *Bruton*. *United States* v. *Muller*, C.A. 3, No. 17,075, decided on October 10, 1968, petition for a writ of certiorari pending, No. 1244 Misc., this Term.

5. Petitioners Levinson and Franklin contend (Pet. No. 1089 pp. 25-29) that the trial judge committed reversible error in refusing in his instructions to read, explain and interpret the regulations of the VA concerning the home loan guaranty program. As the court of appeals noted, however, the pertinent regulations were read to the jury numerous times during the trial, and defense counsel referred to them extensively during closing arguments (G.A. 7-13). An official of the VA was on the stand for nine days and was

examined in great detail on the meaning of the regulations (433a-437a, 480a, 496a, 493a, 485a, 476a, 466a-467a, 503a-507a, G.A. 2-3). The Lenders Manual published by the VA was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to some of the regulations in his charge and carefully instructed the jury as to all the elements necessary to prove violation of 18 U.S.C. 371 and 1001 (1761a-1766a).[6]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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WILL WILSON,
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JEROME M. FEIT,
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MARCH 1969.

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[6] Reliance on *United States* v. *Pincourt*, 159 F.2d 917 (C.A. 3) is misplaced because there the trial judge did not even mention the pertinent regulation violation of which was the essence of the crime.

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Appendix—

Opinion of the Court of Appeals for the Tenth Circuit in the case of Nelson v. United States A1

Cases Cited

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 995

ROSS HOWARD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ROSS HOWARD, Petitioner, prays that this Court grant rehearing of its Order of June 16, 1969, denying the Petition for Writ of Certiorari in the above entitled cause, and that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the Petition filed January 29, 1969, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of the filing of the Petition for Writ of Certiorari there was no conflict of decisions on the question sought to be reviewed. Since that time, an implicit conflict has arisen. On February 12, 1969, the Court of Appeals for the Tenth Circuit announced its Decision in *Everett Churchill Nelson* v. *United States of America,* 406 F.2d 1136 reversing the Decision of the district court for the District of Colorado on the point of the sufficiency of a conspiracy indictment brought under 18 U.S.C. 371 (a copy of the opinion of the Court of Appeals for the Tenth Circuit is appended hereto).

2. In the Nelson case, as in the present case, the question before the Court was the sufficiency of a conspiracy indictment. The Tenth Circuit Court of Appeals held that the indictment was not sufficient in that it did not allege unlawful intent of the co-conspirators when an essential element of the substantive offense which was the object of the conspiracy was an allegation of specific intent. The Tenth Circuit Court of Appeals substantively, by its decision, has adhered to a standard in the construction of the sufficiency of indictments which is stricter than that which the Sixth Circuit Court of Appeals applied in measuring the sufficiency of the indictment in the instant cause.

The Sixth Circuit, in apposition to the holding of the Tenth Circuit, has, in the instant cause, construed the conspiracy indictment with greater liberality than that of the Tenth Circuit and further, this Petitioner asserts that the Sixth Circuit's construction of the indictment was in derogation of the mandate set forth by this Court in *Den-*

nis v. *United States*, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 6 L.Ed. 2d 973 (1966) where the Court said:

> "indictments under the broad language of the general conspiracy statute must be scrutinized carefully. . . ."

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Everett Churchill NELSON,
Appellant,

v.

UNITED STATES of America,
Appellee.

No. 52-68.

United States Court of Appeals
Tenth Circuit.

Feb. 12, 1969.

HILL, Circuit Judge.

Appellant Nelson was tried to a jury and convicted of conspiring to transport altered securities in interstate commerce in violation of 18 U.S.C. § 371. The principal issue raised on this direct appeal is whether a conspiracy indictment is rendered fatally defective as a result of the failure to allege an essential element of the substantive offense upon which the conspiracy charge is based.

The indictment charged that the appellant and another named defendant, together with certain coconspirators, "wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, that is to transport or cause to be transported in interstate commerce, altered securities, knowing the same to have been altered in violation of 18 U.S.C. Sec. 2314." A number of overt acts were also specified but the indictment did not allege that the acts were accompanied "with unlawful and fraudulent intent" as is required to sustain a substantive

violation of 18 U.S.C. § 2314.[1] The failure to properly allege the requisite intent prompted appellant to initiate an unsuccessful pre-trial motion to quash the indictment.

As support for the proposition that the indictment must be dismissed, appellant relies upon Robinson v. United States, 263 F.2d 911 (10th Cir. 1959) where an indictment charging a conspiracy to traffic in narcotics was dismissed for failure to aver that the contraband was known to be unlawfully imported.[2] "The instant indictment fails to make this essential allegation and thus fails to state a public offense." Id. at 912. In dissenting, Judge Phillips indicated that inasmuch as the indictment identified the substantive offense which the defendants were conspiring to commit, it adequately apprised them of the charges and should not have been dismissed. This position was based upon the statement in Wong Tai v. United States, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1957) that the offense which is the object of a conspiracy need not be delineated with the particularity necessary to support a charge premised solely upon a violation of that substantive offense. A number of cases passing upon this question have agreed, often choosing to require little more than a reference to the underlying substantive statute.[3] On the other hand, while espousing the view that

1. E.g., United States v. Salliey, 360 F.2d 699, 701 (4th Cir. 1966); Londos v. United States, 240 F.2d 1, 7 (5th Cir. 1957) cert. denied 353 U.S. 949, 77 S.Ct. 860, 1 L.Ed.2d 858.

2. *Robinson* was followed in the companion case of Burley v. United States, 363 F.2d 912 (10th Cir. 1959); and in Davidson v. United States, 263 F.2d 959 (10th Cir. 1959).

3. United States v. Offutt, 75 U.S.App.D.C. 344, 127 F.2d 336 (1942); Freedman v. United States, 64 F.2d 661 (1st Cir. 1933); United States v. Switzer, 252 F.2d 139 (2d Cir. 1958); Hanks v. United States, 97 F.2d 309 (4th Cir. 1938); Walker v. United States, 342 F.2d 22, 27 (5th Cir. 1965); United States v. Mixon, 374 F.2d 20 (6th Cir. 1967). Indeed, in Stein v. United States, 313 F.2d 518, 521 (9th Cir. 1962), the court expressly rejected

a conspiracy indictment need not unduly particularize the underlying offense, other decisions adhering to the holding in Robinson, have required that the indictment contain an allegation of specific intent where intent is expressly made an element of the offense.[4]

[1-3] In short, while a conspiracy indictment need not allege the underlying offense with the same degree of specificity that is required to charge the offense itself, "indictments under the broad language of the general conspiracy statute must be scrutinized carefully * * *." Dennis v. United States, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966). In conformance with the lessons of Robinson, this scrutiny will be exercised to require an averment of the essential elements upon which the underlying offense rests. In fact, such scrutiny has been exhibited in cases dealing with charges identical to those in the case at bar. There the courts, at least implicitly, indicated that the unlawful intent must be alleged.[5] Such

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Robinson declaring it to be contrary to certain pronouncements of the Supreme Court. The court cited Wong Tai as a case in point. Yet an analysis of the holding in Wong Tai reveals that the indictment in that case, unlike the indictment in Robinson, did contain an allegation that the defendant possessed the requisite guilty knowledge. An examination of additional Supreme Court decisions likewise fails to reveal any direct conflicts. See, United States v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed. 619 (1922); Thornton v. United States, 271 U.S. 414, 423, 46 S.Ct. 585, 70 L.Ed. 1013 (1926); and Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

4. Wilkins v. United States, 376 F.2d 552, 562 (5th Cir. 1967); United States v. Calhoun, 257 F.2d 673 (7th Cir. 1958); United States v. Chamley, 376 F.2d 57 (7th Cir. 1967). Cf., Gendron v. United States, 295 F.2d 897, 901 (8th Cir. 1961).

5. "The indictment * * * adequately charged that the acts forming the object of the conspiracy were done with the requisite intent." United States v. Chamley, 376 F.2d 57, 59 n. 3 (7th Cir. 1967). In Downing v. United States, 348 F.2d 594 (5th Cir. 1965) the court sustained the indictment against an assertion that it failed to allege that the defendant committed any crime against the United States. "The indictment under which [defendant] was tried substantially follows the language of the statutes involved * * *." Id. at 599. This court upheld an indictment "couched in the language of the statutes purportedly violated." Woodring v. United States, 376 F.2d 619, 621 (10th Cir. 1967).

a requirement, contrary to various statements in some of the decisions discussed above is not a reversion to the prolix indictments of the past, but rather, is wholly in keeping with the purpose of an indictment in apprising the accused of the nature of the charges against him. As we indicated in Davis v. United States, 347 F.2d 378, 379 (10th Cir. 1965), "There is no magic to the words used * * * to allege guilty knowledge." What is demanded, however, is a competent and forthright attempt to notify the accused of the extent of his alleged culpability. The present indictment failed to satisfy this criterion and must be dismissed.

[4] Although the indictment was defective for the aforementioned reason, it is necessary to comment briefly upon the assertion by the appellant that the indictment was also faulty because it was based upon the passing of American Express Money Orders which are not "securities" within the meaning of 18 U.S.C. §§ 2311 and 2314. This contention is grounded upon the fact that although the definition of a "security" is somewhat broad, there is no specific reference to money orders. Nevertheless, it is clear that a money order is an "evidence of indebtedness" and therefore included within the statutory definition.[6]

Certain alleged trial errors have also been argued by the appellant. In view of our dismissal of the indictment, those assertions require no further comment except to note that in the event of a new trial, it is assumed that the trial court will take steps to prevent their reoccurrence.

Reversed with instructions to dismiss the indictment.

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6. Cf., Castle v. United States, 287 F.2d 657 (5th Cir. 1961); McGee v. United States, 402 F.2d 434 (10th Cir. 1968); Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967) cert. denied 389 U.S. 885, 88 S.Ct. 155, 19 L.Ed.2d 182; United States v. Smith, 310 F.2d 121 (4th Cir. 1962); United States v. Nelson, 273 F.2d 459 (7th Cir. 1960).

FILED
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IN THE

Supreme Court of the United States

No. 1,089

(Court of Appeals No. 18,206 and 18,207)

BENJAMIN LEVINSON and
FRANKLIN MORTGAGE CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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Now Comes Benjamin Levinson and Franklin Mortgage Corporation, petitioners herein, by their attorney, Ivan E. Barris, and pursuant to Rule 58.2 of the Supreme Court Rules, does petition this Court for a rehearing on their Petition for Certiorari for the following reasons:

1. This Honorable Court has heretofore by its order denied petitioners' Petition for Certiorari on the 16th day of June, 1969.

2. That the petitioners in their Petition for Certiorari had prayed for a Writ of Certiorari directed to the Court of Appeals for the Sixth Circuit, said Court of Appeals having affirmed a judgment of conviction against both petitioners.

3. That petitioners' convictions were predicated in great part on evidence of extra judicial statements made to an F.B.I. Agent by one of petitioners' co-defendants and alleged co-conspirators, who did not himself testify and subject himself to cross-examination; that such procedure was violative of this Court's mandate in *Bruton v. United States,* 391 U.S. 123 (1968) and was certainly not harmless error "beyond a reasonable doubt" so as to avoid reversal (*Chapman v. California,* 386 U.S. 18 (1967)).

4. That this Court should determine whether or not a violation of the Rule enunciated in *Bruton* can ever be harmless error.

5. That the Sixth Circuit Court of Appeals in affirming the judgment of conviction did violate this Honorable Court's mandate in *Bruton v. U.S., supra,* and that for that reason their opinion should be reviewed.

Wherefore, your petitioners pray for a rehearing on their Petition for Certiorari.

IVAN E. BARRIS,
Attorney for Petitioners
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WO 2-8210

CERTIFICATE OF ATTORNEY

Ivan E. Barris, attorney for petitioners, does hereby certify that the Petition for Rehearing is presented in good faith and not for the purposes of delay.

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